90-990 (1)

No. 90-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WEST TEXAS TRANSMISSION, L.P.,
Petitioner,

v.

ENRON CORP., *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Trade Commission can deprive a business corporation of an interest in property pursuant to an enforcement proceeding and consent order to which that corporation has not been made a party.

THE PARTIES BELOW

Plaintiffs—Appellants Below

West Texas Transmission, L.P. (plaintiff), a limited partnership, whose general partner is Valero Northern Texas Company

Valero Natural Gas Partners, L.P. and Valero Energy Corporation and all of its subsidiaries and affiliates (Appendix G) are related to petitioner

Defendants—Appellees Below

The Federal Trade Commission

Enron Corporation, which is the successor in interest to InterNorth, Inc. and Houston Natural Gas Co.

Northern Texas Intrastate Pipeline Company, a subsidiary of Enron Corporation

Intervenor—Appellee Below

TECO Pipeline Company

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PETITION FOR A WRIT OF CERTIORARI

West Texas Transmission, L.P. ("Valero"), [1] hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A) is reported at 907 F.2d 1554. The findings of fact and conclusions of law of the district court (App. D) are not officially reported but have been reprinted at 1989-1 Trade Cases (CCH) ¶ 68,424.

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[1] West Texas Transmission, L.P. is an entity related to Valero Energy Corporation. For convenience, petitioner will be referred to as "Valero", which is consistent with the usage in the opinions below.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1990. A timely petition for rehearing and suggestion for rehearing en banc were denied on September 17, 1990 (App. B). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The fifth amendment to the United States Constitution and pertinent provisions of 15 U.S.C. § 21(a)-(c) (Clayton Act, § 11(a)-(c)), 15 U.S.C. § 45(b) (Federal Trade Commission Act § 5(b)), and 15 U.S.C. § 18 (Clayton Act § 7) are set forth in Appendix H.

STATEMENT OF THE CASE

1. For over 15 years, Valero was the sole owner and operator of the TransTexas Natural Gas Pipeline, which was the heart of its pipeline system. To gain access to capital and a long-term gas supply, Valero entered a joint venture with InterNorth, Inc. in February 1985.[2] As part of this transaction, Valero sold a one-half interest in the TransTexas pipeline to InterNorth,[3] with each side retaining a right of first refusal if the other partner decided to sell its joint venture interest in the line.

Just two months after the partnership was formed, InterNorth announced its intention to terminate its relationship with Valero and to acquire Houston Natural Gas Corporation ("HNG"), Valero's main competitor. Valero sued Enron alleging that the proposed merger violated the antitrust laws and Enron's fiduciary duties as a part-

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[2] InterNorth is the corporate predecessor to respondent Enron Corporation.

[3] InterNorth held its interest in the pipeline venture through its wholly owned subsidiary, respondent Northern Texas Intrastate Pipeline Company.

ner.[4] Valero also complained to the Federal Trade Commission ("FTC") that the merger would harm competition in the Gulf Coast. Valero provided the FTC with all the partnership documents, including Valero's right of first refusal. In late May, Valero's suit against Enron was settled. The settlement, signed on May 28, 1985, required Enron to sell its interest in the TransTexas Pipeline as soon as practicable.

The FTC initiated an investigation of the competitive impact of the proposed merger of InterNorth and HNG, which was designated as FTC Docket No. C-3168. After the Valero settlement, Enron entered into a consent order with the FTC. The order, which became final on September 30, 1985, required divestiture of certain assets including Enron's interest in the TransTexas Pipeline. *In Re InterNorth, Inc.*, 106 F.T.C. 312 (1985). The consent order required divestiture to be made "only in a manner that receives the prior approval of the Federal Trade Commission." App. E. at 65a. Neither Enron nor the FTC joined Valero as a party either to the enforcement proceeding or to the consent order itself.

Enron later obtained an offer from respondent TECO Pipeline Company ("Teco") to purchase its joint venture interest in the TransTexas Pipeline. FTC approval was made a condition precedent to completion of the purchase. Valero sought to repurchase Enron's joint venture interest pursuant to the same terms and conditions. The FTC, however, by letter of May 23, 1988, approved Teco and disapproved Valero as a purchaser because "based upon the record in this case, ... divesture of Enron's interest in TransTexas to Valero would not likely satisfy the remedial purposes of the order in Docket No. 3168."

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[4] InterNorth ultimately completed its merger with HNG. Respondent Enron is the product of this merger. For convenience, respondent Enron and all of its predecessors or affiliate corporations, including respondent Northern Texas Intrastate Pipeline Company, shall be referred to as "Enron," except as the context otherwise requires.

App. F. The FTC never found, nor did it ever contend, that Valero's acquisition of the TransTexas pipeline would violate the antitrust laws.

2. Valero filed this suit in the state district court of Bexas County, Texas, to block the sale of Enron's interest to Teco and to enforce Valero's preferential right of purchase. The state court temporarily enjoined the sale of Enron's interest to Teco. Enron then removed the case to the United States District Court for the Western District of Texas, where jurisdiction rested on 28 U.S.C. § 1331. Enron asserted that the consent order, with its requirement of FTC approval, overrode Valero's right of first refusal and that the FTC's disapproval of Valero as a purchaser ended Enron's obligation to Valero. In response, Valero contended, *inter alia*, that, as a non-party to the consent order and the underlying FTC proceeding, it was not bound by the terms of the consent order.

The district court ruled in Enron's favor. The district court concluded, *inter alia*, that "the FTC was fully authorized to prohibit Enron from performing its contractual obligations to Valero even though Valero was not a party to the FTC action." App. D at 51a. This meant, according to the court, that because the FTC had disapproved Valero as a purchaser, Valero was unable to acquire the TransTexas pipeline, despite its contractual right of first refusal.

3. The Fifth Circuit affirmed. The court acknowledged that "the interaction between the consent decree and Valero's right of refusal subjected Valero's right of refusal to FTC authority." App. A at 28a. But it treated the requirement of FTC approval, which the consent order had imposed, as no different from any other contractual condition subsequent, such as a requirement that a purchaser pass a credit check, that Enron might voluntarily have imposed. *Id.* at 18a. By asserting that Valero thus was only "indirectly" affected by the consent order, the court sought to avoid, and did not address, the

underlying constitutional question whether Valero could be bound by the terms of a consent order when it was not made a party either to that order or to the underlying enforcement proceeding that the order resolved.

REASONS FOR GRANTING THE PETITION

The decision below conflicts with the decisions of this Court in both *Martin v. Wilks*, 109 S. Ct. 2180 (1989), and *W. R. Grace & Company v. Local Union 759*, 461 U.S. 757 (1983). The Court's decisions stand for the rule "that a person cannot be deprived of his legal rights in a proceeding in which he is not a party." *Martin*, 109 S. Ct. at 2183. The decision of the Fifth Circuit in this case violates that rule.

If the decision below is allowed to stand, governmental agencies, such as the FTC, will be able to ignore or sacrifice the rights of persons who are not parties to its investigation or enforcement proceedings, through the expedient of imposing "indirect" approval mechanisms in consent orders with other persons. This is both unfair and constitutionally improper. Neither the FTC nor any other federal agency should be permitted to interfere with a business corporation's pre-existing ownership interests without first joining that corporation in an enforcement proceeding and making it a party to the resulting consent order.

1. In *W. R. Grace*, this Court held that a voluntary consent order cannot affect the contractual rights of nonparties and cannot excuse performance to a nonparty. In that case, an employer had entered into a conciliation agreement with the Equal Employment Opportunity Commission that contained provisions that were contrary to the terms of its existing collective bargaining contract. The Court determined that the conciliation agreement was ineffective to modify the collective bargaining contract:

> Although the Company and the Commission agreed to nullify the collective bargaining agreement's

> seniority provisions, the conciliation process did not include the Union. Absent a judicial determination, the Commission, not to mention the Company, cannot alter the collective bargaining agreement without the Union's consent.

461 U.S. at 771.

This principle, that a claimant cannot be deprived of substantial rights *in absentia*, also underlies the Court's more recent decision in *Martin v. Wilks*. That case arose out of a reverse discrimination lawsuit filed by several white firefighters employed by the city of Birmingham, Alabama, whose promotions were blocked as a consequence of a consent decree that settled a previous Title VII case by black firefighters. This Court held that the white firefighters, who had not been parties to that consent decree, remained free to assert their own claims of discrimination and that the consent decree could not be interposed as an affirmative defense to those claims.

These cases enforce a fundamental rule of due process that a stranger to a dispute "may rest assured that a judgment recovered therein will not affect his legal rights." *Martin*, 109 S. Ct. at 2185 (quoting *Chase Nat'l Bank v. Norwalk*, 291 U.S. 431, 441 (1934) (Brandeis, J.)). As the Court further explained in *Martin*:

> The parties to a lawsuit presumably know better than anyone else the nature and scope of relief sought in the action, *and at whose expense such relief might be granted.* It makes sense, therefore, to place on them a burden of bringing in additional parties where such a step is indicated, rather than placing on potential additional parties a duty to intervene when they acquire knowledge of the lawsuit.

109 S. Ct. at 2186 (emphasis added).

The decision below violates these precepts. Because Enron and the FTC did not join Valero as a party to their enforcement proceeding and consent order, that order is

powerless to affect Valero's contractual right to repurchase Enron's interest in the TransTexas Pipeline.

2. The Fifth Circuit brushed aside these concerns on the theory that there is no "direct" conflict between Valero's contractual rights and the consent order between Enron and the FTC. The court reasoned that Valero's right of first refusal implicitly subjected Valero to any terms that Enron might choose to impose, including those imposed as a consequence of a consent order to which Valero was a stranger. But that ignores the fact that such rights go to the very core of partnership interests in a joint venture like the TransTexas Pipeline:

> [P]referential purchase rights give the various participants assurance that interests will not be sold to undesirable parties who could frustrate development or direct it along paths that the other participants oppose.

Reasoner, *Preferential Purchase Rights in Oil and Gas Instruments*, 46 Tex. L. Rev. 57 (1967). As a matter of contract law, such rights are not subject to the easy manipulation envisoned by the Fifth Circuit. *See, e.g.*, *Foster v. Bullard*, 496 S.W.2d 724, 736 (Tex. Civ. App.—Austin 1973), *aff'd on appeal after remand*, 565 S.W.2d 66 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.); *Hewatt v. Leppert*, 376 S.E.2d 883, 885 (Ga. 1989). *See also DM II, Ltd., v. Hospital Corporation of America*, 130 F.R.D. 469, 472 (N.D. Ga. 1990) (applying *Martin* in case holding partnership to be indispensable party in litigation involving partners).[5]

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[5] Moreover, prior to any consent decree, Valero and Enron had entered into an agreement that required Enron to sell its pipeline interest as soon as practicable. Thus, the Fifth Circuit's general observation that the "holder of the first refusal right cannot compel a recalcitrant owner to convey the property," App. A at 14a (citing *Sanchez v. Dickinson*, 551 S.W.2d 481, 484 (Tex. Civ. App.—San Antonio 1977, no writ)), is beside the point.

The court below improperly permitted the FTC, with Enron's cooperation, to use its enforcement power over Enron to strip Valero of its contractual right to regain exclusive ownership of the TransTexas Pipeline. As one FTC staff member had indicated to the Commission, a consent order should not be effective to terminate a contractual interest unless the holder of that right is made a party or separately negotiates a release of its interest:

> Where a joint venture asset is to be divided under an order, the Commission should make sure that the firm under order has the power to carry out the divestiture without being subject to an approval requirement. In some cases, the Commission should require that a firm negotiate an agreement to this effect with its partners prior to the Commission provisionally accepting the order.

Def. Ex. G-9 at 1812 (March 15, 1988). Such a procedure was a requisite of due process. The FTC should not be allowed to bind nonconsenting nonparties "indirectly" and thus bypass the rule articulated in such cases as *Martin v. Wilks* and *W. R. Grace.*

The Fifth Circuit's adoption of the "indirect versus direct" test reflects the position taken by the dissent but rejected by the majority in *Martin.* The dissent argued that the consent decree there did not "impinge on any contractual rights of the unions or their members." 109 S. Ct. at 2192 (Stevens, J., dissenting). The decree also did not "preclude the hiring or promotion of whites and males even for a temporary period of time." *United States v. Jefferson County*, 28 F.E.P. Cases 1834, 1836 (B.N.A.) (N.D. Ala. 1981), *aff'd*, 720 F.2d 1511 (11th Cir. 1983). The majority nevertheless rejected this argument that the respondents were "only suffering practical adverse effects from the consent decree," explaining that "[e]ither the fact that the disputed employment decisions are being made pursuant to a consent decree is a defense to respondent's Title VII claims or it is not . . . ." *Id.* The court held that that fact was not a defense.

The same analysis applies here. There is no question that Enron's consent order has "practical adverse effects" on Valero and that Enron has asserted the consent order as a defense. The Fifth Circuit acknowledged that "Enron is bound by the consent decree to include that FTC approval term in any purchase agreement," App. A at 30a, and that "Valero is bound by the terms of its preemptive right to accept that term." *Id.* Permitting Valero to be bound in this way is incompatible with *Martin v. Wilks.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 89-5512

WEST TEXAS TRANSMISSION, L.P.,
Plaintiff-Appellant,
v.

ENRON CORPORATION, *et al.*,
Defendant-Appellees.

Aug. 9, 1990

Rehearing and Rehearing En Banc Denied
Sept. 17, 1990

Before CLARK, Chief Judge, THORNBERRY and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge:

West Texas Transmission, L.P. ("Valero") appeals from the district court's order denying specific performance of Valero's right of first refusal to repurchase from Enron Corporation and Northern Texas Intrastate Pipeline Company ("Enron") a one-half interest in the TransTexas Natural Gas Pipeline. After a bench trial, the district court found that, as a prerequisite to Valero's pipeline acquisition, the stock purchase agreement between Valero and Enron required Valero to receive FTC approval of the purchase. Further, according to the court, the FTC possessed statutory authority to imple-

ment the initial consent decree with Enron, requiring Enron to receive FTC consent for any pipeline sale, and subjecting Valero, an independent third party, to FTC authority. Valero challenges both of these rulings. We affirm.

BACKGROUND

From 1969 until 1985, Valero Transmission Company, a predecessor of West Texas Transmission, L.P., constructed and operated the TransTexas Natural Gas Pipeline between Waha and New Braunfels, Texas. This pipeline carried natural gas from production areas in the Permian Basin to the region in and around New Braunfels, Valero's major market. The pipeline also merged with a network of pipelines serving the Gulf Coast.

In 1985, Valero's traditional markets vanished due to an oversupply of natural gas. To replace its diminished sales, Valero elected to increase its Gulf Coast operations. Although Valero owned pipeline facilities servicing Texas' industrial areas, Valero lacked both the capital to expand its operations, and ready access to a long-term supply of natural gas. Valero eliminated these impediments on February 28, 1985, by initiating a joint venture, the Nor-Val partnership, with NorTex, a wholly-owned subsidiary of Internorth, Inc. NorTex possessed an abundance of low-priced natural gas in the Midwest's Huken field area, but lacked a pipeline network to transport this gas to Houston. In exchange for a one-half interest in Valero's pipeline, NorTex contributed its long-term supply of natural gas and enough working capital to finance the enterprise.

The parties memorialized their arrangement in an Ownership Agreement. Under Article IX, section 9.1 of this contract, both parties retained a right of first refusal to repurchase the pipeline if either party should choose to sell its undivided half interest. The parties forwarded their agreement to the FTC as part of their

Hart-Scott-Rodino filing. When the FTC took no action to inhibit the sale, the partnership began operations.

Two months later, Internorth, NorTex's parent company, merged with Houston Natural Gas to form Enron, Inc.[1] Houston Natural Gas ("HNG"), one of Valero's principal competitors, held a 50% interest in the Oasis pipeline, which paralleled the NorVal pipeline route. Believing that this acquisition by Internorth violated NorTex's fiduciary duties to Valero under the Ownership Agreement, and that it raised serious antitrust concerns, Valero filed suit in federal court to block the merger. Valero also alerted the FTC to the potential anticompetitive effects of Internorth's acquisition.

Valero and Enron resolved their dispute on May 28, 1985 by signing a Settlement and Indemnity Agreement. NorTex consented to sell its one-half interest in the pipeline to an Acceptable Purchaser. Valero retained the right to disapprove of any pipeline purchaser tendered by NorTex, and reaffirmed its right of first refusal, originally secured under the Ownership Agreement. Both parties covenanted to use their best efforts to locate a prospective partner for Valero.

Meanwhile, the FTC elected to investigate the Internorth/HNG merger under both Section 7 of the Clayton Act (15 U.S.C. § 18) and Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45). *In re InterNorth, Inc.*, 106 F.T.C. 312, 317 (1985). Determining that the affiliation raised concerns under the antitrust laws, the FTC formulated a consent decree with Internorth and HNG permitting the merger to proceed if the parties divested themselves of certain assets and dissolved particular contracts. The decree listed "[t]he fifty percent (50%) undivided interest in the TransTexas Pipeline

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[1] For purposes of this opinion, we will refer to the defendants, Enron Corporation and its subsidiary Northern Texas Intrastate Pipeline Company collectively as "Enron."

that was acquired pursuant to the Purchase Agreement, dated as of February 28, 1985" among Internorth's assets to be sold. *In re InterNorth, Inc.*, 106 F.T.C. at 323, Schedule A.

The order also provided that Internorth could divest itself of the itemized assets "only to an acquirer or acquirers, and only in a manner that receives the prior approval of the Federal Trade Commission." *In re InterNorth, Inc.*, 106 F.T.C. at 319. *See* "Analysis to Aid Public Comment", 50 Fed. Reg. 25235, 25258 (to be codified at 16 C.F.R. pt. 13) (proposed June 18, 1985). The FTC retained this approval power to guarantee that any divestiture would effectuate the purposes underlying the decree: "to ensure the continuation of the assets as ongoing, viable enterprises engaged in the same business in which the Properties are presently employed and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint." *In re InterNorth, Inc.*, 106 F.T.C. at 319.

Despite the mandatory divestiture and approval provisions of the consent decree, the FTC's order did not mention Valero's right of first refusal over the pipeline. The FTC knew that Valero received this right from Internorth under the Ownership Agreement. Further, Valero first brought the antitrust ramifications of the Internorth/HNG merger to the FTC's attention. Nevertheless, the FTC did not invite Valero to participate in the negotiations underlying the document, or make Valero a party to the final decree.

Before issuing its final order, the FTC published the proposed consent decree in the Federal Register, and instituted a 60-day notice and comment period. 50 Fed. Reg. 25235, 25258 (to be codified at 16 C.F.R. pt. 13) (proposed June 18, 1985). The FTC also widely disseminated press releases delineating the contents of the decree and inviting interested parties to submit criticisms. Valero received actual notice of the consent decree's

divestiture and approval requirements. However, Valero elected not to oppose the terms of the order, to propose revisions, or to seek an exemption from the FTC approval process. Upon receiving no response to these publications, the FTC issued its formal complaint and decision on September 30, 1985, permitting the merger contingent upon the requisite divestitures. *In re InterNorth, Inc.*, 106 F.T.C. at 312. Enron began to solicit prospective purchasers for its assets.

In the meantime, Valero sought to reorganize and refinance its internal operations by assigning its own pipeline interest to Valero Natural Gas Partners, L.P., a related entity. Enron threatened to block this assignment by exercising its right of first refusal. On March 24, 1987, the parties executed the TransTexas Settlement Agreement to resolve this and other continuing pipeline disputes. Modifying the 1985 Settlement and Indemnity Agreement, this contract eliminated Valero's veto rights restructured Valero's right of first refusal, allowing Valero to repurchase the pipeline only if the prospective independent purchaser offered less than forty million over any pipeline purchaser tendered by NorTex. It also dollars.

This settlement agreement permitted Valero to proceed with its reorganization. Although Valero Natural Gas Partners, L.P. initially received the right of first refusal, it reassigned the right to Valero NorTex L.P., another Valero affiliate, in September, 1987. Eight months later, Valero NorTex L.P. changed its name to West Texas Transmission, L.P., the plaintiff in this suit.

During Valero's reorganization period, Enron negotiated to sell 100% of its NorTex stock, including its pipeline interest, to TECO Pipeline Company. The parties executed informal letter agreements on July 15, 1987, and signed the Stock Purchase Agreement on July 30, 1987. The agreement expressly conditioned consummation of the sale on FTC approval under the consent order, and on Valero's decision not to exercise its first refusal

rights. If the FTC failed to act in a timely fashion, the agreement would expire by its own terms on October 15, 1987. Enron formally requested the FTC to approve TECO's acquisition on July 23, 1987.

Enron also promptly informed Valero about the terms and conditions of the proposed sale to TECO. By letter dated September 8, 1987, Valero elected to exercise its right of first refusal to repurchase the pipeline "under the same terms and conditions as agreed to by TECO and Enron." On September 11, 1987, Enron and Valero executed the same Stock Purchase Agreement that TECO had signed, replacing TECO's name with Valero's, applying relevant provisions to Valero rather than to TECO, and advancing the involuntary termination date to November 27, 1987. Valero's agreement also contained the FTC approval requirement as a condition precedent to consummation of the deal. Valero never objected to this prerequisite. On September 22, 1987, Enron asked the FTC to approve this divestiture to Valero.

While the FTC scrutinized the approval requests, Valero lobbied the FTC for confirmation of Valero's repurchasing plan, and for a modification of the Enron/Valero agreement. Under the original Enron/TECO contract, TECO appointed Enron as its agent to negotiate and execute all agreements for the transportation of natural gas through the TransTexas Pipeline. Enron would subject all third-party gas carried by the pipeline to the TransTexas tariff, creating an artificially high minimum price for the fuel. This same arrangement, if applied to Valero, would prevent Valero from competitively pricing its gas in the San Antonio market. On September 18, 1987, Valero met with the FTC to discuss this arrangement. Approximately three weeks later, Valero wrote a letter to the FTC describing additional ramifications of this proposal, and encouraging the FTC to approve Valero as a purchaser while rejecting the agency agreement. The FTC failed to take any action on the approval requests, and both purchase contracts terminated.

At this stage, Valero bargained with Enron for a direct purchase of the pipeline. After the parties reached an apparent accord, Enron informed Valero that it would not proceed with the transaction. Apparently, the FTC had advised Enron that it might disallow Valero's repurchase.[2] For the first time, Valero expressed its belief that the FTC lacked jurisdiction under the consent decree to review Valero's acquisition.[3] Nevertheless, Enron terminated its discussions with Valero, and pursued another purchase agreement with TECO.

Enron and TECO signed this second Stock Purchase Agreement on January 28, 1988. As with the first agreement, the parties subjected this second deal to an FTC approval requirement, and to Valero's decision not to exercise its first refusal rights. Enron submitted TECO's second contract to the FTC for approval on February 2, 1988.

Enron also divulged the terms and conditions of the second TECO contract to Valero, at which time Valero elected to repurchase the pipeline. Valero and Enron executed an interlineated copy of the second TECO agreement on March 29, 1988. Two separate provisions of this contract incorporate the FTC approval requirement as a prerequisite for the deal. Section 1.07 provides:

> 1.07 *Seller's Conditions to Closing.* The obligations of Seller to proceed with the closing are subject, at the option of Seller, to the satisfaction of the conditions that . . . (iii) all approvals relating to the Federal Trade Commission Decision and Order re Internorth, Inc. (Docket C-3168) issued September

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[2] 8 Trial Transcript at 53; Letter from Palmer L. Moe, President of Valero, to Louis Potempa, Vice President for Enron (January 25, 1988) (discussing second proposed sale to TECO).

[3] Letter from Palmer L. Moe to Louis Potempa (January 25, 1988).

> 30, 1985, insofar as it relates to the System (as defined in this Agreement) shall have been obtained.

Similarly, section 1.09 states:

> 1.09 *Termination.* This Agreement shall terminate automatically (i) if the FTC disapproves or rejects Seller's divestiture of Company to Buyer, or (ii) if FTC approval of Buyer has not been received by December 31, 1988 . . .

Despite this unambiguous language, Jack Spinks, Vice President for Valero, submitted a contemporaneous letter to Enron in which he attempted to undermine these provisions:

> This will serve to advise you that it is the position of Valero NorTex that the provisions of the Purchase Agreement do not in any way change, amend, modify, restrict or limit Valero NorTex' right of first refusal with respect to the . . . interest in the TransTexas pipeline system owned by Northern Texas. . . . [I]t is the position of Valero NorTex that the disapproval or rejection by the F.T.C. of Valero NorTex' purchase will not operate to terminate such right of first refusal and such right will continue in full force and effect, notwithstanding any approval by F.T.C. of the similar Purchase Agreement with TECO.

Letter from Jack Spinks, Vice President for Valero NorTex L.P. to Enron Corp. (March 29, 1988). None of Enron's officers signed this letter or incorporated it as part of the second agreement.

Furthermore, both before and after executing this contract, Valero, and its Vice President Jack Spinks, embraced the opposite position. In letters forwarding information to companies interested in purchasing Enron's one-half interest from Valero once Valero completed the repurchase, Spinks admitted that Valero's acquisition was

subject to FTC approval.[4] Valero made the same admission in its 10-K filing before the Securities and Exchange Commission, and in the affidavit accompanying its Hart-Scott-Rodino filing before the FTC.[5]

Valero also actively participated in the FTC approval process. Prior to signing the second agreement, Valero met with the FTC to discuss its repurchasing strategy. At that time, the FTC expressed reservations about the resultant level of concentration in the San Antonio market, and the loss of a competitive balance in the Permian Basin, if Valero reacquired the TransTexas Pipeline. On April 11, 1988, twelve days after Enron submitted Valero's second contract to the FTC for approval, Valero dispatched a letter to the FTC addressing these misgivings and urging the FTC to approve Valero.[6] Valero also informed the FTC that Valero's prior contractual right of first refusal would trump the FTC's approval requirement, particularly since the FTC "validated" this right when it took no action on the original NorVal documents. According to Valero, the Hart-Scott-Rodino Act, 15 U.S.C. § 18a, provided the only authority under which the FTC could review this repurchase.[7]

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[4] Letter from Jack Spinks to Pat Pelder of Reliance Gas Marketing Company (April 5, 1988); Letter from Jack Spinks to Bob Pasteris of West Texas Pipeline Gas Co. (February 16, 1988).

[5] "Valero Energy Corporation Form 10-K Annual Report", Securities and Exchange Commission File No. 1-4718 at 9 (Fiscal Year Ending Dec. 31, 1987); Affidavit of Palmer L. Moe, President and Chief Operating Officer of Valero, in conjunction with Hart-Scott-Rodino filing (April 12, 1988).

[6] Letter from Stan McLelland, Senior Vice President for Valero, to Daniel P. Ducore, Deputy Assistant Director of FTC (April 11, 1988).

[7] In reality, Valero did not need to make a Hart-Scott-Rodino filing since FTC exempted assets transferred pursuant to an FTC consent order from the pre-merger notification requirements. 16 C.F.R. § 802.70.

Unpersuaded by Valero's contentions, the FTC sent Enron a letter disapproving Enron's divestiture to Valero.[8] According to the FTC, the divestiture would "not achieve an adequate lessening of concentration among pipeline companies moving gas out of the Permian Basin." Additionally, the sale "would increase the already high concentration levels among pipeline companies able to economically supply natural gas to the San Antonio area." [9] At the same time, the FTC ratified the proposed divestiture to TECO because, as a new entrant into the market, TECO "[would] help achieve the remedial goals of the Commission's [consent decree]." [10]

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[8] Letter from Emily H. Rock, Secretary of FTC to Bertram M. Kantor, Legal Counsel for Enron and attorney with Wachtell, Lipton, Rosen & Katz (May 23, 1988) (Regarding potential divestees of the pipeline).

[9] *See* also Memorandum from John Morris and David Reiffen, Economists to FTC (March 11, 1988) (Concerning TransTexas Divesture) ("The level of, and increase in, concentration in the San Antonio market area . . . suggest[s] that Valero would be more likely to exercise market power in the San Antonio area if it were to acquire Enron's share of TransTexas.")

[10] Valero surmises that the FTC erred not only by exercising approval power over the sale, but also by disallowing Enron's sale to Valero as a result of the FTC's decision to approve the purchase by TECO. 9 Trial Transcript at 248. The record does not support this argument.

As Valero contends, the FTC could have approved the sale to both purchasers, permitting Enron to choose the ultimate owner. However, documents from the FTC make it quite clear that the FTC found Valero's repurchase of the pipeline to be unacceptable. *See* Memorandum from John Morris and David Reiffen, Economists to FTC (March 11, 1988) ("Valero is not an acceptable purchaser.") According to FTC economists, "the most reasonable solution seems to be for the Commission to reject the sale to Valero, approve an acceptable purchaser (TECO), and take any appropriate steps to prevent Valero from exercising its right of first refusal if Valero blocks a procompetitive divestiture." *Id.* By approving TECO and disapproving Valero in the same letter, the FTC sought to emphasize Valero's unacceptability as a repurchaser, rather than to pick and

Valero took two actions in response to the FTC's letter. Before the Commission, Valero requested that the FTC rescind its disapproval of the divestiture to Valero, or in the alternative that the FTC reopen the proceedings which resulted in the consent order. To support this request, Valero contended that the Commission's disapproval of Valero:

> abrogate[d] Valero's preexisting right of first refusal to reacquire its interest in the TransTexas pipeline without any evidence that [Valero's exercise of that right] would violate the antitrust laws, without a hearing as to whether the exercise of Valero's contractual rights would violate the antitrust laws, and without a finding by the Commission that Valero's exercise of its preexisting contractual right would violate the antitrust laws.[11]

Valero also divulged that it planned to acquire and resell Enron's pipeline interest to a more suitable partner than TECO. In connection with its rescission request, Valero met with the FTC on five different occasions, and submitted a memorandum to the FTC detailing Valero's concerns.[12]

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choose among several acceptable potential acquirers. *See* Memorandum from Joseph Eckhaus and Roy Conn III, Attorneys for FTC, to Commission, 4 Administrative Record Relating to TransTexas Divestiture, FTC docket No. C-3168, at 2114 (July 22, 1988); Memorandum from Mark Horoschak, Attorney Advisor to the FTC, to the Public Record, FTC Docket Number C-3168 (May 9, 1988) (Minutes of Meeting with Enron's Counsel); Memorandum from Barbara A. Clark, Deputy Director of FTC, to the Commission, 4 Administrative Record Relating to TransTexas Divestiture, FTC docket No. C-3168, at 1817 n. 4 (March 15, 1988).

[11] *See* Memorandum from Joseph Eckhaus and Roy Conn III, Attorneys for FTC, to Commission, 4 Administrative Record Relating to TransTexas Divestiture, FTC docket No. C-3168, at 2121 (July 22, 1988).

[12] Memorandum from Valero to FTC, 1 Administrative Record Relating to TransTexas Divestiture, FTC docket No. C-3168 at 1642-1734 (August 2, 1988).

In a letter dated August 18, 1988, the FTC explained in detail why it was denying Valero's request for reconsideration.[13] First, Valero had notice of the consent decree and many opportunities to present its objections to the FTC before the FTC finalized its order. By electing not to participate in the notice and comment process, Valero waived its objections. Second, Valero failed to present its objections in a timely fashion to the FTC during the approval process for either the first or the second purchase contract, again waiving those arguments.

Third, the FTC's actions did not impinge upon Valero's right of first refusal. Valero exercised that right twice, signing two different purchase agreements which expressly conditioned Valero's reacquisition of the pipeline on FTC approval. Fourth, sale of the pipeline to Valero would not achieve the remedial purposes of the consent decree to eliminate the lessening of competition in the Permian basin area. Finally, Valero had disclosed its immediate intention to resell the pipeline. Since the FTC could not monitor this resale, Valero's reacquisition of the pipeline could undermine the consent decree's purposes to increase competition, and to ensure the continuation of the assets as ongoing, viable enterprises. For these reasons, the FTC denied Valero's request for reconsideration.

Besides pursuing its interests before the FTC, Valero also raised its objections to FTC disapproval in state court. On May 27, 1988, Valero filed a contract action in Bexar County, Texas, claiming that Enron's sale of its TransTexas pipeline interest to TECO violated Valero's first refusal rights, as exercised in the second Enron/Valero repurchase agreement. Valero received a tempo-

[13] Letter from Benjamin I Berman, Acting Secretary of FTC, to David M. Foster, Legal Counsel for Valero and attorney with Fulbright & Jaworski, 1 Administrative Record Relating to TransTexas Divestiture, FTC docket No. C-3168 at 1744-1754 (August 18, 1988).

rary restraining order and subsequently secured a temporary injunction (June 9, 1988), both of which prevented Enron from conveying its pipeline interest to TECO pending a final decision on the merits.

Defendants Enron and NorTex removed the case to federal court, where the temporary injunction remained in effect. Valero amended its complaint to add the FTC as a party, alleging that the FTC exceeded its constitutional and statutory authority, and acted arbitrarily and capriciously when it disapproved the pipeline sale to Valero. Enron responded that it had not breached the sales agreement, and that a forced sale to Valero would cause Enron to violate the consent decree.

After a trial on the merits, the district court found that Enron had included the FTC approval condition in the second Enron/Valero repurchase agreement in good faith, that Valero signed the contract containing that prerequisite, and that the FTC disapproved the sale. As a result, Enron was under no obligation to convey the TransTexas Pipeline to Valero. With regard to the FTC, the court held that the FTC acted within its statutory authority when it entered the consent order, that the FTC could condition mandatory pipeline divestiture on FTC approval of the purchaser, and that the FTC did not arbitrarily and capriciously withhold its approval from Valero. Based on these findings, the court entered judgment for the defendants, and dissolved the temporary injunction. Valero appeals.

DISCUSSION

It is uncontroverted that Valero signed a pipeline repurchase agreement which conditioned acquisition of the TransTexas pipeline on FTC approval of Valero as the purchaser. Valero does not contend that it executed the contract under duress, or that Enron's bad faith induced Valero to sign the agreement. Instead, on appeal, Valero

pursues its two-pronged attack against the contract's FTC approval term.

Under the contract itself, Valero argues that by insisting on FTC approval as a prerequisite to the agreement, Enron created an untenable dilemma: either Valero could exercise its preemptive rights by signing the sales contract which subjected it to FTC control, or Valero could reject the contract and lose the pipeline. Valero asserts that this dilemma effectively gutted its preemptive rights. With regard to the FTC, Valero contends that the Commission exceeded its statutory authority by manipulating the Enron consent decree to extinguish the pre-existing contract rights of a non-party and by disapproving Valero as a purchaser without first determining that the acquisition violated federal antitrust laws. We reject both prongs of this attack.

Valero's argument that Enron and the FTC abrogated its pre-existing right of first refusal misunderstands the nature of the preemptive rights guaranteed to Valero by the Ownership Agreement.[14] A "right of first refusal", also known as a "preemptive right" or a "preferential right of purchase," permits the rightholder to purchase the subject property, once the owner chooses to sell, on the terms and conditions specified in the contract granting the right. *Holland v. Fleming*, 728 S.W.2d 820, 822 (Tex.Civ.App.1987, writ ref'd n.r.e.); *Palmer v. Liles*, 677 S.W.2d 661, 665 (Tex.Civ.App.1984, writ ref'd n.r.e.); *Sanchez v. Dickinson*, 551 S.W.2d 481, 484 (Tex.Civ.App. 1977, no writ); *Martin v. Lott*, 482 S.W.2d 917, 920 (Tex.Civ.App.1972, no writ); *Gochman v. Draper*, 389 S.W.2d 571 (Tex.Civ.App.1965, writ granted), reversed on other grounds, 400 S.W.2d 545 (Tex.1966). The holder of the first refusal right cannot compel a recalcitrant owner to convey the property. *Sanchez*, 551

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[14] The Ownership Agreement provides that Texas law governs conflicts over contract interpretation.

S.W.2d at 484, 485; 77 Am.Jur.2d Vendor & Purchaser § 49 (1975). Rather, the contract guarantees that the rightholder will receive notice when the owner intends to sell the property, information about the terms and conditions of that sale, and a reasonable period within which to accept or reject the offer. *Martin*, 482 S.W.2d at 920, 922. *See* 1A Corbin on Contracts § 261 (1963).

The details of a particular preemptive right depend upon the contract between the parties. The terms of those contracts vary widely, and courts must scrutinize the parties' language to ascertain the scope of the preemptive right.[15] 1A Corbin on Contracts § 261 (1963). Although some contracts specify the price at which the owner must sell the property, most contracts base the sale price and other terms of the rightholder's purchase contract on the bona fide offer made by a third party. *Sanchez*, 551 S.W.2d at 485-86; *Sinclair Refining Co. v. Allbritton*, 147 Tex. 468, 218 S.W.2d 185, 188 (1949). *See Brownies Creek Collieries, Inc. v. Asher Coal Mining Co.*, 417 S.W.2d 249, 252 (Ky.Ct.App.1967). 1A Corbin on Contracts § 261 (1963); 77 Am.Jur.2d Vendor & Purchaser § 49 (1975).

Article IX of the 1985 Ownership Agreement between Valero and Enron spells out the parties' rights of first refusal. Section 9.1 states:

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[15] The moment at which the owner must offer the property for sale to the rightholder will also vary from contract to contract. Some contracts require the owner to offer the property for sale to the rightholder before soliciting offers from any independent party. Other contracts oblige the owner to communicate any third-party offer to the rightholder and permit the rightholder to match that offer. If the owner elects to accept the proffered terms, the owner must sell the property to the rightholder. *Mecom v. Gallagher*, 213 S.W.2d 304, 305 (Tex.Civ.App.1947, no writ). Finally, some owners need only forward to the rightholder the terms and conditions of those offers which they are willing to accept. If the rightholder duplicates those terms, he acquires the property. *See Holland v. Fleming*, 728 S.W.2d 820 (Tex.Civ.App.1987); 1A Corbin on Contracts § 261 (1963).

> 9.1 *Right of First Refusal.* In the event either Party desires to sell or transfer all or part of its undivided interest in the System to an entity other than an affiliated entity of that Party and receives or solicits a bona fide offer or agreement from a prospective purchaser (who must be ready, willing, and able to purchase) that such Party is willing to accept, then the Party desiring to sell or transfer such interest shall first give written notice of the proposed sale to the other Party, such notice to set forth the *terms and conditions* of such proposed sale and the name and address of the prospective purchaser. The other party shall then have a prior right, for a period of sixty (60) days after receipt of such notice, to agree to purchase such interest *on the same terms and conditions* as set forth in such offer or agreement to purchase . . . .

Under this provision, when Enron receives an acceptable bona fide offer from a prospective pipeline purchaser, Enron must forward the terms and conditions of that offer to Valero. If, within sixty days, Valero elects to meet those terms and conditions, this provision obligates Enron to sell Valero the half-interest.

Valero contends that by executing this provision, Enron pre-approved Valero as the purchaser of the pipeline, as long as Valero matched the price term offered by the third party. Enron breached this preemptive right, the argument continues, by interjecting an intermediate condition, FTC approval, into the purchaser agreement. We reject this contention.

The Ownership Agreement between Enron and Valero explicitly allows Valero to reacquire the pipeline "on the same terms and conditions as set forth in [a third party] offer or agreement to purchase." Under this language, the terms and conditions governing Valero's repurchase remain indeterminate until Enron receives an acceptable

offer from a third party. *Joe T. Garcia's Enterprises v. Snadon*, 751 S.W.2d 914, 916 (Tex.Civ.App.1988, writ denied). *See Gyurkey v. Babler*, 103 Idaho 663, 651 P.2d 928, 931 (1982). Nowhere does the Ownership Agreement require Enron to include specific conditions in this offer, or limit the terms for which Enron may bargain with the potential purchaser. Once Enron communicates its third-party offer to Valero, however, Enron binds itself to accept these conditions and cannot place additional prerequisites on Valero's exercise of its preemptive rights. *Sinclair Refining Co.*, 218 S.W.2d at 188; *Holland*, 728 S.W.2d at 822-23; *Henderson v. Nitschke*, 470 S.W.2d 410 (Tex.Civ.App. 1970, writ ref'd n.r.e.). *See* 77 Am. Jur.2d Vendor & Purchaser § 49 (1975). Until that time, however, the Ownership Agreement does not restrict Enron's ability to strike its best deal and to require Valero to match that bargain.

Traditional contract principles do marginally circumscribe this bargaining freedom, but the FTC approval provision remains well within these limitations. Under language comparable to that used in the Enron/Valero Ownership Agreement, the owner of property subject to a right of first refusal remains master of the conditions under which he will relinquish his interest, as long as those conditions are commercially reasonable, imposed in good faith, and not specifically designed to defeat the preemptive rights. *Holland*, 728 S.W.2d at 823. *See McCulloch v. M & C Beauty Colleges*, 194 Cal.App. 3d 1338, 240 Cal.Rptr. 189 (1987); *Brownies Creek Collieries, Inc.*, 417 S.W.2d at 252; *Hood v. Hawkins*, 478 A.2d 181 (R.I.1984); *Weber Meadow-View Corp. v. Wilde*, 575 P.2d 1053, 1055 (Utah 1978); *Matson v. Emory*, 36 Wash.App. 681, 676 P.2d 1029, 1032-33 (1984). *See* 1A Corbin on Contracts § 261 (1963). Where the owner meets these three standards, the holder of the right of first refusal lacks grounds to remove specific conditions from the contract, or to extract other concessions as part of the agreement.

In the present case, TECO agreed to subject its pipeline purchase to FTC approval. The Ownership Agreement makes this term part of any purchase contract between Enron and Valero, as long as the approval requirement is commercially reasonable, imposed in good faith, and not specifically designed to defeat Valero's preemptive rights. The district court found that Enron and TECO included the approval term in good faith, without subterfuge or collusion, and without an ulterior motive to override Valero's right of first refusal. Valero does not object to these conclusions.

The approval requirement is also commercially reasonable. Whether a specific condition is reasonable must be determined by examining the circumstances of a particular case. *Prince v. Elm Investment Co., Inc.*, 649 P.2d 820, 825 (Utah 1982). In this instance, Enron and TECO agreed to include the approval term only after extensive arms-length negotiations which resulted in a comprehensive pipeline purchase agreement. Enron did not dictate the approval term to TECO, or coerce TECO into accepting that term. On the contrary, TECO undoubtedly gained concessions from Enron in other contract areas to offset the risk that the FTC might withhold its consent. Where two sophisticated businesses reach a hard-fought agreement through lengthy negotiations, it is difficult to conclude that any negotiated term placed in their contract is commercially unreasonable.

Furthermore, business venturers routinely subject their contracts to outside approval for financing or credit-worthiness in order to guarantee the financial success of venture. *McCulloch*, 194 Cal.App.3d at 1338, 240 Cal. Rptr. at 189; *Keys Lobster v. Ocean Divers*, 468 So.2d 360, 362 (Fla.App.), rev. denied 480 So.2d 1295 (1985). For Enron, the FTC approval requirement serves a similar function. Without that term, Enron risked fines of $10,000 per day under the consent decree if the FTC disapproved of the pipeline acquirer. In order to prevent

these losses, Enron requested FTC approval as a precondition to the purchase agreement. For these reasons, we find that Enron did not violate Valero's right of first refusal by incorporating the FTC approval term into the TECO purchase agreement.

Even if Enron legitimately included the FTC approval term in the purchase agreement, Valero contends that it could exercise its right of first refusal without matching this term. According to Valero, its preemptive rights require it to match only the *price* term of any third party offer. Further, assenting to the agreement while rejecting FTC approval should suffice as acceptable under standard contract principles, since Valero's qualified acceptance would not substantially modify the terms of TECO's third-party offer. Finally, Enron's bad faith in committing anti-trust violations, and in submitting TECO's contract to the FTC, should excuse Valero's strict compliance with the contract terms. Once again, we find that both the Ownership Agreement and well-settled contract principles defeat these arguments.

In order for Valero to exercise its preemptive rights, the Ownership Agreement compels Valero to match the "terms and conditions" offered by a third party. The agreement does not define the phrase "terms and conditions" to mean only the price suggested by a prospective purchaser. When construing similar language in other contracts, most courts have insisted that purchasers replicate a myriad of non-price conditions, including terms requiring adequate credit and special payment terms, *McCulloch*, 194 Cal.App.3d at 1338, 240 Cal.Rptr. at 189; *Keys Lobster*, 468 So.2d at 362; the assumption of real estate commissions, *Fallenius v. Walker*, 787 P.2d 203, 205 (Colo.App.1989), *cert. denied* (1990); additional partnership and land development obligations, *Prince*, 649 P.2d at 823-26; the exchange of land parcels rather than a cash transaction, *Matson*, 676 P.2d at 1033; and the purchase of a larger quantity of land, *Crow-Spieker No.*

23 v. Robert L. Helms Construction and Development Co., 103 Nev. 1, 731 P.2d 348, 350 (1987). *But see Gyurkey*, 651 P.2d at 932, and cases cited therein. Valero presents no rationale justifying a contrary interpretation of the identical language in this case.

As Valero correctly points out, some courts have allowed purchasers to exercise their preemptive rights by duplicating solely the price term offered by the third-party. In most of these cases, however, the contract which created the preemptive right specified that price would be the only relevant term. *Kroehnke v. Zimmerman*, 171 Colo. 365, 467 P.2d 265 (1970) ("[I]f during the term of this lease . . . the lessors . . . should desire to sell said demised premises, then the lessees . . . shall have the privilege of purchasing the same for the same *price* for which the lessors would be willing to sell to any other person."); *Schmidt v. Downs*, 775 P.2d 427, 430 (Utah App.1989); *Wilson v. Whinery*, 37 Wash.App. 24, 678 P.2d 354 rev. denied (1984). By contrast, Valero's Ownership Agreement requires Valero to meet the "terms and conditions" contained in a third party offer. Had Enron and Valero intended to restrict the phrase "terms and conditions" to mean only price, the parties could have executed an agreement similar to those construed in these other cases.

One case which Valero cites does contain language replicating Valero's right of first refusal. *Hallmark Builders Inc. v. Hickory Lakes of Brandon, Inc.*, 444 So.2d 1047 (Fla.App.1984). However, in that case, the third party offer which *Hallmark* was required to duplicate contained only one relevant term—the price of the property. Under the "terms and conditions" language, Hallmark needed to reproduce only the price term. On the other hand, the comprehensive purchase contract between Enron and TECO contains many relevant terms, one of which specifies the purchase price. Valero's preemptive right requires Valero to meet all relevant terms and conditions.

Valero next contends that while it must meet the "terms and conditions" contained in TECO's contract, Valero may ignore any non-material provisions when tendering its acceptance. According to Valero, FTC approval is not a material term. By requiring Valero to match that term or to forego this transaction, Enron created a false dilemma. Valero signed the purchase contract containing that term to avoid losing the pipeline; however, Enron and Valero never reached a consensus over FTC approval. Accordingly, the court should find both that Valero could exercise its option without agreeing to FTC approval, and that the contract between the parties did not actually include that term. Valero's argument contradicts the facts of this case and contravenes well-settled contract principles since any attempt by Valero to accept the TECO contract without the FTC approval term would substantially vary the terms of the sales agreement.

When the preemptive rightholder receives notice that the property owner intends to sell his property to a third party, the rightholder's right of first refusal matures into an *option*, for which the third party offer dictates the terms. *Sinclair Refining Co.*, 218 S.W.2d at 188; *Holland*, 728 S.W.2d at 822-23; *Henderson*, 470 S.W.2d at 410. *See* 77 Am.Jur.2d Vendor & Purchaser § 49 (1975). Before the option can ripen into an enforceable contract of sale, the rightholder must manifest his acceptance. *Walker v. Horine*, 695 S.W.2d 572, 576 (Tex.Ct.App.1985, no writ); *White v. Miller*, 518 S.W.2d 383 (Tex.Civ.App. 1974, writ dism'd); *Hutcherson v. Cronin*, 426 S.W.2d 638 (Tex.Civ.App.1968, no writ).

Valero argues that adoption of the TECO contract without including the FTC approval term would have constituted a valid acceptance, since FTC approval was not a material term. Whether or not a particular contract term is material is not the standard by which we judge whether an acceptance which rejects that term is a valid exercise of the right of first refusal. Like the

acceptance of any other offer, the exercise of an option, must be "unqualified, absolute, unconditional, unequivocal, unambiguous, positive, without reservation and according to the terms or conditions of the option." *Scott v. Vandor*, 671 S.W.2d 79, 84 (Tex.Civ.App.1984, writ ref'd n.r.e.); *White*, 518 S.W.2d at 383; *Hutcherson*, 426 S.W.2d at 638; *Vratis v. Baxter*, 315 S.W.2d 331, 337 (Tex.Civ. App.1958, writ ref'd n.r.e.). *See Austin Presbyterian Theological Seminary v. Moorman*, 391 S.W.2d 717 (Tex.), *cert. denied* 382 U.S. 957, 86 S.Ct. 434, 15 L.Ed. 2d 361 (1965). An unqualified acceptance guarantees that the owner of the property will receive the benefit of the bargain under which he agreed to relinquish his interests. *Holland*, 728 S.W.2d at 823. *See McCulloch*, 194 Cal.App.3d at 1338, 240 Cal.Rptr. at 189; *Brownies Creek Collieries, Inc.*, 417 S.W.2d at 252; *Hood*, 478 A.2d at 181; *Weber Meadow-View Corp.*, 575 P.2d at 1055; *Matson*, 676 P.2d at 1032-33. *See* 1A Corbin on Contracts § 261 (1963).

Where an acceptance varies from the original offer, the property owner stands to lose his bargain. *Zeidman v. Davis*, 161 Tex. 496, 342 S.W.2d 555 (1961); *White*, 518 S.W.2d at 383; *Hutcherson*, 426 S.W.2d at 638; *Vratis*, 315 S.W.2d at 337; *Lambert v. Taylor Telephone Cooperative*, 276 S.W.2d 929, 932 (Tex.Civ.App.1955, no writ) (determining whether particular variations in acceptance are substantial). As a result, a purported acceptance which leaves the property owner "as well off" as a third party offer, but which modifies, adds to or otherwise qualifies the terms of the offer, generally constitutes a rejection of the option and a counter-offer. *Austin Presbyterian Theological Seminary*, 391 S.W.2d at 717; *Hutcherson*, 426 S.W.2d at 638; *Lambert*, 276 S.W.2d at 932. *See Brownies Creek Collieries, Inc.*, 417 S.W.2d at 252; *Northwest Television Club v. Gross Seattle Inc.*, 96 Wash.2d 973, 634 P.2d 837, 840 (1981), opinion modified by 96 Wash.2d 973, 640 P.2d 710 (1982); *Matson*, 676 P.2d at 1032. The property owner

remains free to accept this counter-offer or to sell the property to the third party, but the preemptive right lapses because the rightholder has failed to make a valid acceptance.

Some courts have recognized a limited exception to these principles of strict conformity for those acceptances which contain minor or insubstantial variations from the original offer. *Brownies Creek Collieries, Inc.*, 417 S.W. 2d at 252 ("[M]inor variations which obviously constitute no substantial departure should be allowed."). *See Prince*, 649 P.2d at 825; *Matson*, 676 P.2d at 1032. No hard and fast rules determine when a variation is "insubstantial," however, courts invoke this exception only when two conditions exist. *Northwest Television Club*, 634 P.2d at 841.

First, the third-party offer may contain terms which are peculiar to the relationship between the third-party and the property owner, and which the preemptive rightholder could never satisfy. For instance, in *Northwest Television Club v. Gross Seattle Inc.*, 96 Wash.2d 973, 634 P.2d 837, 841 (1981), the third party agreed to purchase rental property if he was able to sell his own Mercer Island residence. The seller offered these same terms and conditions, including sale of the Mercer Island property, to the rightholder. The rightholder obviously could not meet this last condition since he did not own that property. Nevertheless, the court rejected the owner's contention that the rightholder failed to exercise his preemptive rights, since the condition embodied nothing more than the third party's attempt to arrange financing. *Id.* 634 P.2d at 841. As long as the rightholder could demonstrate adequate financial resources, the court would prevent the owner from imposing impossible terms to override the rightholder's interest.

Second, the unique conditions do not provide a reasonable basis for distinguishing between the two offers, raising the inference that the seller imposed those terms in

bad faith to defeat the option. *Zeidman*, 342 S.W.2d at 555; *Jones v. Gibbs*, 133 Tex. 627, 130 S.W.2d 265, 272 (1939); *Cattle Feeders Inc. v. Jordan*, 549 S.W.2d 29, 33 (Tex.Civ.App.1977, no writ); *Tiffany Development Corporation v. Cangelosi*, 514 S.W.2d 321 (Tex.Civ.App. 1974, no writ); *Best Building Company v. Sikes*, 394 S.W.2d 57, 63-4 (Tex.Civ.App.1965, writ ref'd n.r.e.) (owners' wrongful refusal to convey other property defeated option over tract at issue); *Colligan v. Smith*, 366 S.W.2d 816 (Tex.Civ.App.1963, writ ref'd n.r.e.). Whether the justification for a unique term is reasonable depends upon the circumstances of the particular case. *Prince*, 649 P.2d at 825.

For example, in *Prince*, the seller formed a partnership with the third party to acquire, improve and lease the seller's property. The preemptive rightholder offered to meet these partnership terms, but the seller refused because "the bundle of consideration that [seller] received from [the third party] is unique and cannot be duplicated as a matter of law." 649 P.2d at 823. This consideration included the third party's "reputation, expertise and experience in developing office buildings, success in development of real estate, integrity, business history, business contacts, financial strength, effective organization and personal compatibility with [seller]." *Id.* at 823-24. Although the court agreed that unique features underlying the contract could defeat the right of first refusal, the court required the seller to justify those features according to ascertainable commercial standards. *Id.* at 825. If the seller cannot offer an adequate justification, the preemptive rightholder is permitted to meet the conditions of the offer without satisfying these unique terms.

Where these two circumstances do not exist, the courts have required the rightholder to meet all of the terms and conditions of the third party offer, even if this requirement effectively defeats the right of first refusal. The

case of *Keys Lobster v. Ocean Divers*, 468 So.2d 360, 362 (Fla.App.1985) is particularly instructive. There, the seller conditioned sale of his property on proof by the third party that it was sufficiently creditworthy. Seller offered these same terms to the preemptive rightholder, who was unable to demonstrate his creditworthiness. The court permitted the seller to convey the property to the third party because the seller imposed the credit inspection term in good faith to protect his own business interests, and because it was not impossible for the preemptive rightholder to meet that term. *Id.* at 362.

The two conditions for application of the exception to strict compliance do not exist in Valero's case. The FTC approval term was not a unique condition which arose out of the particular relationship between Enron and TECO. Instead, the consent decree between Enron and the FTC motivated Enron to place that term into *every* contract for purchase of the pipeline. Indeed, Enron testified that it would not sign any agreement which omitted this term. Additionally, the district court specifically found that Enron included that term in the TECO contract in good faith in order to avoid violating the consent decree. Enron did not strive to defeat Valero's right of first refusal. Furthermore, the commercial realities on Enron's situation made FTC approval a reasonable way to distinguish between Valero's and TECO's offers. If the pipeline purchaser did not meet the FTC's guidelines, Enron would subject itself to fines of up to $10,000 per day. Avoiding these fines is clearly commercially reasonable.

Since the exception does not apply, Valero was required to meet all the terms and conditions of the TECO contract, including the FTC approval term. Failure to include this term in the acceptance would make Valero's exercise of its preemptive rights ineffectual. However, Valero did acquiesce in that term when it signed an interlineated version of the TECO agreement.

Valero contends that although it signed this agreement, it did not intend to submit its purchase to the FTC for approval. As evidence for this proposition, Valero tendered a letter which it had submitted to Enron at the time that Valero and Enron executed the TECO purchase contract. *See* Letter from Jack Spinks, Vice President for Valero NorTex L.P. to Enron Corp. (March 29, 1988), Section I, p. 1559 *supra*. However, Enron never signed this letter, or otherwise consented to include the document as part of the agreement between the parties. *See Deauville v. Federated Department Stores*, 756 F.2d 1183, 1193 (5th Cir.1985); *Richland Plantation Co. v. Justiss-Mears Oil*, 671 F.2d 154, 156 (5th Cir.1982). Since the FTC approval provisions are unambiguous, this court may not employ this letter to vary the terms of the parties' signed agreement. *Cherokee Water Co. v. Forderhause*, 641 S.W.2d 522, 524-25 (Tex.1982); *Pinehurst v. Spooner Addition Water Co.*, 432 S.W.2d 515 (Tex.1968); *Palmer*, 677 S.W.2d at 665. Consequently, regardless of the contrary intent which Valero claims to have displayed, Valero is bound by the FTC approval term in its purchase contract.[16]

With regard to Valero's contract claims, then, we conclude that Enron did not violate Valero's right of first refusal. Enron included the FTC approval term in the TECO contract in good faith. Valero's right of first refusal required it to accept this term in order to exercise

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[16] In the alternative, we could have interpreted the letter presented by Valero at the time that Valero executed the TECO purchase agreement as a rejection of TECO's offer and a counter-offer, because Valero sought to vary one of the material provisions of the purchase agreement. *See Austin Presbyterian Theological Seminary*, 391 S.W.2d at 717; *Hutcherson*, 426 S.W.2d at 638; *Lambert*, 276 S.W.2d at 932. Under this scenario, Valero would have failed to exercise its right of first refusal in accordance with the contract, and Enron could have conveyed the pipeline to TECO. Since Enron did not advance this argument, we do not base our decision on this point.

its preemptive right. Valero did indeed accept this term when it executed the TECO contract. When Valero failed to meet this condition, Enron was no longer obliged to reconvey the pipeline to Valero. *Hohenberg Bros. Co. v. George E. Gibbons & Co.*, 537 S.W.2d 1, 3 (Tex.1976).

In addition to its contract claims against Enron, Valero challenges the FTC's authority to impose an approval condition on non-parties to the consent decree. Enron had pre-approved Valero as a pipeline purchaser. When the FTC entered into the consent decree, it manipulated Valero's pre-existing contract rights by requiring Enron to receive its approval before selling the pipeline to Valero. Then, the FTC exceeded its statutory authority by disapproving Valero without first determining that Valero's acquisition violated federal antitrust laws. Accordingly, Valero urges us to nullify the FTC's authority over Valero's purchase. We decline to follow this suggestion.

There is no doubt that the FTC had the authority to invalidate Enron's merger with Houston Natural Gas unless the partners divested certain of their interests. 15 U.S.C. §§ 21, 45. *See United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 331, 81 S.Ct. 1243, 1252, 6 L.Ed.2d 318 (1961); *Lieberman v. F.T.C.*, 771 F.2d 32, 34 (2nd Cir.1985); *Yamaha Motor Co. v. F.T.C.*, 657 F.2d 971 (8th Cir.1981, *cert. denied* sub. nom. *Brunswick Corp. v. FTC*, 456 U.S. 915, 102 S.Ct. 1768, 72 L.Ed.2d 174 (1982)); *United States v. Beatrice Foods Co.*, 493 F.2d 1259, 1273 (8th Cir.1974), *cert. denied*, 420 U.S. 961, 95 S.Ct. 1350, 43 L.Ed.2d 438 (1975); *F.T.C. v. PepsiCo. Inc.*, 477 F.2d 24, 29 (2nd Cir.1973). Furthermore, the FTC may police the asset divestiture, including approval of the purchaser, to ensure that it satisfies the purposes of the consent decree. *See North American Telecommunications Ass'n v. FCC*, 772 F.2d 1282, 1293 (7th Cir.1985); *Beatrice Foods Co.*, 493 F.2d at 1273. Valero argues that its case is different, how-

ever, because Enron pre-approved Valero as a purchaser of the pipeline, and FTC approval interfered with these contract rights.

Once again, Valero misunderstands the nature of its preemptive right. As explained above, the conditions under which Valero may exercise its right of first refusal materialize after Enron receives a valid offer from an independent third party. Valero may not dictate the terms and conditions of its purchase agreement. Although Valero's right of first refusal arose before the consent decree, the third-party contract containing the approval term was finalized *after* Enron entered into the consent decree. Valero's right of first refusal required it to match the terms in this subsequent contract, including that of FTC approval. As a result, the FTC did not manipulate the consent decree impermissibly to reach a third party. Rather, the interaction between the consent decree and Valero's right of first refusal subjected Valero to FTC authority.[17]

A different situation would exist if Valero had received an option to purchase the pipeline under terms and conditions specified in the original Ownership Agreement. Under the scenario, the FTC approval term would have modified the terms of a contract that was already binding upon Enron. Even in that situation, however, Valero could not compel specific performance of its option contract, since performance of that option would prevent enforcement of an FTC order.[18] *See National Licorice Co.*

[17] The same result would obtain if Enron had entered into an agreement with its bankers placing certain conditions, such as a cash purchase requirement, upon Enron's divestiture of its interest in the pipeline. Valero's inability to satisfy the cash purchase requirement would not necessarily mean that Enron or the bankers had deliberately undermined Valero's right of first refusal or that this condition was unenforceable as to Valero.

[18] The Supreme Court's decision in *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983)

v. NLRB, 309 U.S. 350, 363, 60 S.Ct. 569, 577, 84 L.Ed. 799 (1940); *Conner v. Burford*, 848 F.2d 1441, 1458-59 (9th Cir.1988); *PepsiCo. Inc. v. F.T.C.*, 472 F.2d 179, 188 (2nd Cir.1972). Valero's case never reaches this level, however, because Valero held a right of first refusal rather than an option to purchase.

This distinction between rights of first refusal and option contracts explains why *Martin v. Wilks*, —— U.S. ——, 109 S.Ct. 2180, 2185, 104 L.Ed.2d 835 (1989) is inapposite here. In *Martin* white firefighters, who were denied promotions under the terms of their contracts because of an affirmative action consent decree, sued Birmingham, Alabama and the Jefferson County Personnel Board for race discrimination. Both the City and the Board defended against the suit on the grounds that the consent order required them to make race conscious promotions, and that the white firefighters should have intervened in the consent decree proceeding. The Supreme Court rejected the intervention requirement, explaining that "Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by the judgment or the decree." *Id.* at 2186. Accordingly, the Court remanded to the district court for a trial of the claim on the merits.

Valero's situation does not resemble the *Martin* plaintiffs' predicament. Unlike the decree in *Martin*, which directly prevented the promotion of white firefighters, the consent decree between the FTC and Enron does not directly bind Valero. Rather, Valero must submit its

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supports this conclusion. While the decision recognizes that a company cannot necessarily avoid its obligations under a prior contract because these obligations violate the terms of a subsequent consent order, the court also found that the company's liability for breach of the agreement might be limited to an award of damages rather than specific performance. 461 U.S. at 767-769 & n. 13, 103 S.Ct. at 2184-2185 & n. 13.

acceptance to the FTC for approval because its *right of first refusal* requires Valero to meet the terms and conditions of a third party offer. One of those conditions happens to be FTC approval. Enron is bound by the consent decree to include that FTC approval term in any purchase agreement. Valero is bound by the terms of its preemptive right to accept that term. Therefore, it is the Ownership Agreement and not the consent decree which binds Valero.

As a result, Enron could require Valero to live up to its Ownership Agreement by submitting the purchase contract to the FTC for approval. Furthermore, the FTC could approve or disapprove of Valero as the purchaser as long as Valero's acquisition would impede enforcement of the consent decree. *Beatrice Foods Co.*, 493 F.2d at 1274-75. *See F.T.C. v. Colgate-Palmolive Co.*, 380 U.S. 374, 85 S.Ct. 1035, 13 L.Ed.2d 904 (1965). The FTC's reasons for disapproval meet this standard. Moreover, Valero has not appealed the district court's findings that the FTC did not act arbitrarily and capriciously when it disapproved Valero. Consequently, we will not address this issue.

Having found both that the FTC approval term did not violate Valero's contractual right of first refusal and that the FTC did not exceed its statutory authority when disapproving Valero as a pipeline purchaser, the decision of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-5512

WEST TEXAS TRANSMISSION, L.P.,
Plaintiff-Appellant,

versus

ENRON CORPORATION,
NORTHERN TEXAS INTRASTATE PIPELINE COMPANY,
TECO PIPELINE COMPANY, and
FEDERAL TRADE COMMISSION,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion August 9, 5 Cir., 1990, —— F.2d ——)

(September 17, 1990)

Before CLARK, Chief Judge, THORNBERRY and JONES, Circuit Judges.

PER CURIAM:

☒ The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SA 88 CA 0638

WEST TEXAS TRANSMISSION, L.P.,
Plaintiff

v.

ENRON CORP.,
NORTHERN TEXAS INTRASTATE PIPELINE COMPANY,
and the FEDERAL TRADE COMMISSION,
Defendants

TECO PIPELINE COMPANY,
Intervenor

JUDGMENT

[Filed Dec. 16, 1988]

In accordance with the Findings of Fact and Conclusions of Law entered on the record on the 6th day of December 1988:

It is ORDERED, ADJUDGED AND DECREED that Valero's request that Enron be permanently enjoined from selling its interest in the TransTexas Pipeline to any purchaser other than Valero and Valero's request for an order requiring Enron to Sell that interest to Valero is DENIED.

It is further ORDERED, ADJUDGED and DECREED that Valero's request that the Court declare illegal anv

order or ruling by the Federal Trade Commission (FTC) that would prevent Enron's sale of its interest in the TransTexas Pipeline to Valero and Valero's request that the FTC be enjoined from preventing such a sale by Enron is DENIED.

It is further ORDERED, ADJUDGED and DECREED that the temporary injunction entered by the state court prior to removal of this cause is hereby DISSOLVED.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SA 88 CA 0638

WEST TEXAS TRANSMISSION, L.P.,
Plaintiff

v.

ENRON CORP.,
NORTHERN TEXAS INTRASTATE PIPELINE COMPANY,
and the FEDERAL TRADE COMMISSION,
Defendants

TECO PIPELINE COMPANY,
Intervenor

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Filed Dec. 16, 1988]

Plaintiff, West Texas Transmission, L.P., brought this action against Enron Corp. and Northern Texas Intrastate Pipeline Company, defendants, in state court over defendants' failure to honor plaintiff's right of first refusal for the purchase of the TransTexas natural gas pipeline. Defendants removed to federal court, and plaintiff added the Federal Trade Commission as a defendant. Teco Pipeline Company also intervened.

Pursuant to this Court's Order of November 2, 1988, and FED.R.CIV.P. 42(b), a bench trial was held beginning on December 5, 1988, to determine the issue regarding the legal effect, if any, of the FTC-Enron Corporation

Consent Decree on Enron's prior contractual responsibilities to the plaintiff (i.e., the plaintiff's right of first refusal and/or the authority of the FTC to approve or disapprove a prospective acquisition, including Valero's reacquisition of the entire TransTexas National Gas Pipeline, and/or any ancillary issues thereon, (egs., waiver, estoppel, laches).[1] With the exception of defendants' contentions in paragraph a. below, all other issues relating to plaintiff's claims against Enron for alleged breach of contract and Enron's defenses thereto were not tried in this proceeding. However, due to the Court's holding that Enron Corp. did not breach the contract by which Valero could exercise its right of first refusal a separate trial on the remaining issues will not be necessary.

In general, the plaintiff ("Valero") contends for the purpose of the separate trial the following:

a. Valero contends that the FTC/Enron consent order did not give the FTC the right or authority to disapprove and thereby block Valero's exercise of its pre-existing right of first refusal, absent a charge (and proof) by the FTC that Valero's re-acquisition of its former interest in the pipeline would violate the antitrust laws.

b. Valero contends that it is not estopped, nor did it waive its right to object to the FTC's disapproval of its re-acquisition of its former interest in the pipeline.

c. Alternatively, if the FTC had the right or authority to approve or disapprove of Valero's reacquisition of its interest in the pipeline, its decision to disapprove Valero's re-acquisition was arbitrary and capricious.

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[1] Plaintiff West Texas Transmission, a limited partnership, is related to Valero Energy Corporation. For simplicity, plaintiff throughout this opinion will be referred to as "Valero."

d. The facts demonstrate that the FTC has unconstitutionally deprived Valero of a valuable property right.

In general, the defendants ("Enron" and "FTC") and Intervenor ("Teco") contend for the purpose of the separate trial the following:

a. Because Enron's contract with Teco required prior FTC approval as a condition to the sale, Valero, in order to exercise its right of first refusal, must also agree to a contract that requires prior FTC approval as a condition to the sale before Valero can claim any breach of contract by Enron.

b. Enron's compliance with the FTC order, which requires divestiture of the pipeline but only to a buyer who has received prior FTC approval, takes precedence over a private party's request for specific performance to purchase the same pipeline (pursuant to the exercise of a pre-existing contractual right of first refusal) when the private party (Valero) has been disapproved by the FTC.

c. In the following respects "constituting waiver, estoppel, etc.," Valero has conditioned the exercise of its right of first refusal on prior FTC approval:

(i) Valero's failure to object to the 1985 FTC Consent Order or to obtain an exemption on the basis of its pre-existing right of first refusal from the requirement that the FTC approve any purchaser, despite the ample opportunity Valero had as an interested party under FTC procedures to raise such objection or to suggest such a modification of the Consent Order.

(ii) Valero's expressly agreeing in the contracts by which it has sought to exercise its right of first refusal that its purchase of En-

ron's pipeline interest would be conditioned on FTC approval.

(iii) Valero's actively seeking Commission approval in 1987 and 1988 and seeking to use the FTC's approval process as a means of obtaining concessions from Enron.

(iv) Valero's failure to contest the Commission's approval authority or the manner of the time prior to the FTC's decision disapproving Valero as a purchaser.

d. The FTC's decision to disapprove Valero as a divestee under the FTC's 1985 consent order was neither arbitrary nor capricious.

On the basis of the pleadings, the agreed Pretrial Order, and trial testimony and exhibits, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. This Court has jurisdiction to dispose of all claims in this matter and there is proper venue.

2. In 1969, a predecessor of plaintiff, West Texas, constructed the TransTexas Natural Gas Pipeline from Waha, Texas, northwest of Fort Stockton to New Braunfels, Texas, a distance in excess of 480 miles. Until 1985 the TransTexas pipeline was solely owned and operated by a predecessor in interest of West Texas, Valero Transmission Company.

3. Roughly paralleling Valero's line, but extending to the Houston market, was a pipeline known as the Oasis line, owned in part by one of Valero's principal competitors, Houston Natural Gas (HNG).

4. On February 28, 1985, Valero sold a 50% undivided interest in the TransTexas Pipeline to NorTex, a wholly-owned subsidiary of InterNorth, Inc., and NorTex

and Valero entered into an Ownership Agreement related to the TransTexas Pipeline.

5. Article IX of the Ownership Agreement gives Valero a "right of first refusal" to purchase NorTex's 50% interest in the pipeline in accordance with its terms. NorTex is required to give written notice to Valero of any proposed sale to a third party, and Valero may exercise its right of first refusal within 60 days thereafter. However, Valero did not have the right to comment, dictate, or veto the "terms and conditions" of any future sale of NorTex's 50% interest.

6. In May 1985, InterNorth, parent of NorTex, acquired Houston Natural Gas Corporation and the surviving successor corporation is now Enron Corp. Prior to consummation of the acquisition, Valero entered into a Settlement and Indemnity Agreement dated May 28, 1985, with InterNorth and NorTex which resolved pending litigation between the parties related to the proposed acquisition.

7. InterNorth and Houston Natural Gas Corporation thereafter voluntarily entered into an agreed proposed Consent Order with the Federal Trade Commission. On June 18, 1985, the proposed Consent Order was placed on the public record for comment for a period of 60 days. The Consent Order allowed the InterNorth/HNG merger to proceed, but required InterNorth to divest the 50% undivided interest in the TransTexas Pipeline pursuant to the terms of the order.

8. The order did not address Valero's right of first refusal. Valero was not a party to the agreed consent order. Valero was not a party to the Consent Order, nor to the settlement proceedings leading to the entry of the Order.

9. By its publication in the Federal Register, *see* 50 Fed. Reg. 25255 (June 18, 1985), and a widely disseminated press release, interested parties were given

notice of the terms of the Consent Order and an opportunity to comment on the Order. No such objections or comments having been received by the FTC within the time provided, the FTC issued on September 30, 1985 its formal complaint and a decision making the Consent Order final. *See* 106 F.T.C. 312 (1985).

10. Prior to entering into the Settlement and Indemnity Agreement with Enron, Valero had actively urged the FTC's opposition to Enron's acquisition of HNG. Valero had actual notice of the terms of the proposed Consent Order, including the requirement that Enron divest its interest in the TransTexas Pipeline and that the divestiture be made to a purchaser approved by the FTC. Valero had the full opportunity to object to the terms of the proposed Consent Order or proposed revisions to the FTC. Nevertheless, Valero made no objection or comment to the FTC regarding the Consent Order. Valero never sought to obtain an exemption from the Consent Order's prior approval requirement in the event Valero wished to buy Enron's interest in the TransTexas Pipeline pursuant to its right of first refusal.

11. Well over a year after the Consent Order had become final, on March 24, 1987, Valero and Enron entered into the TransTexas Settlement Agreement to amend and clarify the May 25, 1985, Settlement and Indemnity Agreement because of continuing disputes regarding the TransTexas Pipeline. By the TransTexas Settlement Agreement, Valero expressly relinquished any right to subject the purchaser of Enron's interest in the TransTexas Pipeline to Valero's approval.

12. On August 28, 1987, Valero assigned its right of first refusal under the Ownership Agreement to Valero Natural Gas Partners, L.P., an affiliate of Valero. On September 11, 1987, Valero Natural Gas Partners, L.P., assigned the right of first refusal in the Ownership Agreement to Valero NorTex, L.P., a Delaware limited partnership and an affiliate of Valero. On or about May

1988, the name of Valero NorTex, L.P., was changed to West Texas Transmission, L.P., plaintiff herein. The general partner of West Texas is Valero Northern Texas Company, a corporation with its principal place of business in San Antonio.

13. Beginning in May of 1985, Enron undertook efforts to divest its interest in the TransTexas Pipeline. In 1987 Enron entered into an agreement with Teco providing for the sale of the interest to Teco subject to the approval by the FTC under the 1985 Consent Order. Definitive agreements reflecting these terms were executed by Teco and Enron on July 30, 1987. A specific condition to the closing of the transaction was FTC approval under the 1985 Consent Order.

14. Enron notified Valero of its proposed sale to Teco, and by letter dated September 8, 1987, Valero notified Enron that it would exercise its right of first refusal "under the same terms and conditions as agreed to by Teco and Enron." On September 11, 1987, Valero executed the same agreements Teco had executed with certain interlineations made to replace Teco's name with Valero's and to make the agreements apply to Valero as opposed to Teco. By these agreements Valero specifically agreed that the sale could not close until FTC approval under the 1985 Consent Order had been obtained.

15. On July 23, 1987, Enron submitted the FTC a request for approval of the divestiture to Teco under the terms of the Teco Stock Purchase Agreement, and on September 22, 1987, Enron submitted to the FTC a request for approval of the divestiture to Valero under the terms of the Valero Stock Purchase Agreement.

16. While these requests for approval were pending, Valero actively urged the FTC to approve the divestiture to Valero. Representatives of Valero met with the FTC staff on September 19, 1987 to present Valero's arguments for approving divestiture to Valero as opposed to Teco. At this meeting, Valero requested that the FTC,

as a part of its granting approval of divestiture to Valero, require Enron to agree to modify a proposed Agency Agreement between Enron and Teco that Valero would also have to enter into if it were to acquire the pipeline interest under the same terms and conditions as Teco. By letter dated October 8, 1987, Valero again raised with the FTC the subject of the proposed Agency Agreement, asking the FTC to expressly disapprove the Agency Agreement.

17. The FTC did not act on these applications before both the Teco and the Valero agreements had expired by their own terms.

18. On January 28, 1988, Enron and Teco entered into a second Stock Purchase Agreement, setting forth again the terms and conditions of a sale by Enron of the pipeline interest to Teco. The second Teco Stock Purchase Agreement again expressly provided that the sale was subject to FTC approval and the failure of Valero to exercise its right of first refusal.

19. By letter dated January 29, 1988, Enron notified Valero of the proposed sale to Teco under the second Teco Stock Purchase Agreement, and on March 29, 1988, Valero and Enron executed an interlineated copy of the second Teco Stock Purchase Agreement with Valero substituted as the purchasing party. Although Valero revised certain provisions in the agreement, the express condition of FTC approval remained in the agreement as executed by Valero.

20. On February 2, 1988, Enron formally requested that the FTC approve divestiture to Teco under the second Teco Stock Purchase Agreement, and on March 30, 1988, Enron formally requested that the FTC approve divestiture to Valero under the second Valero Stock Purchase Agreement.

21. While these applications were pending, Valero again actively urged the FTC to approve Valero's pur-

chase. By letter dated April 11, 1988, Valero presented to the FTC detailed arguments as to why the FTC should approve divestiture to Valero.

22. The FTC, after considering the requests for approval and the materials submitted to it by the parties, approved the divestiture to Teco and disapproved the divestiture to Valero. The FTC notified Enron of this decision by letter dated May 23, 1988.

23. Prior to notification that the FTC had disapproved divestiture to it, Valero never challenged either the FTC's authority to require prior approval of a divestiture to Valero or the procedures the FTC followed in exercising that approval power. Valero never argued that the FTC's disapproval of a divestiture to Valero would be an invalid abrogation of Valero's preexisting right of first refusal, nor did it request any hearing regarding the approval issued.

24. According to the May 23 letter, the sole basis for the FTC's disapproval of Valero was that (1) the sale would not achieve an adequate lessening of concentration among pipeline companies moving gas out of the Permian Basin, and (2) it would increase the concentration levels among pipeline companies able to economically supply natural gas to the San Antonio area.

25. On June 8, 1988, Valero filed with the FTC a request that the FTC rescind its disapproval of Enron's application for divestiture to Valero or, in the alternative, that the FTC reopen the proceeding in which the consent Order had been entered, Docket No. C-3168.

26. In connection with this request, Valero was given the opportunity to submit to the FTC whatever legal and economic arguments it wished and the opportunity to discuss the request in meetings with the FTC staff and the individual Commissions themselves. Valero presented to the FTC its arguments at meetings on June 29, July 14, and August 1, 4, and 5, 1988. On August 2, 1988, Valero

submitted to the FTC a memorandum setting forth these arguments in writing. In its presentations to the FTC, Valero made it clear that it wished to acquire Enron's TransTexas interest in order to resell it to a partner that Valero considered more suitable than Teco. Valero never identified to the FTC such a more suitable partner.

27. Enron's purpose in entering into the contracts to sell its interest in the TransTexas Pipeline was to comply with the FTC's Consent Order. That Order required that divestiture be made to a purchaser who had the prior approval of the FTC. For that reason the requirement of FTC approval contained in each of the Teco Stock Purchase Agreements was a material condition, agreed to by the parties in good faith and to ensure compliance with the Consent Order. Enron would not have entered into either the Teco or parallel Valero Stock Purchase Agreements if the express condition of FTC approval had not been present. Enron did not breach the contract by which Valero could exercise its right of first refusal.

28. On August 18, 1988, the FTC denied Valero's request for reconsideration.

29. On May 27, 1988, Valero filed this action in state court seeking to enforce its contractual right of first refusal and obtained an order temporarily restraining Enron from selling its pipeline interest to Teco. On June 9, 1988, the state court entered a temporary injunction order.

30. No divestiture of Enron's interest in the TransTexas Pipeline has occurred due to the June 16, 1988 temporary injunction.

31. On June 8, 1988, soon after Valero had commenced this lawsuit in state court and obtained a temporary restraining order blocking Enron's sale to Teco, Valero filed a request with the Commission asking it to rescind its disapproval of Valero as a divestee or, in the alternative, to reopen the consent order proceeding. Adm. Rec.

1589-1597. In its petition Valero argued that the Commission lacked authority to approve or disapprove Valero as a purchaser of Enron's interest in the pipeline in the absence of evidence and a finding that the acquisition by Valero would violate Section 7 of the Clayton Act. Nearly two months later it filed a memorandum with attachments in support of its petition. Adm. Rec. 1642-1734. It also met with several FTC Commissioners or their assistants. Adm. 1735, 1750, 1818-1852.

32. On August 18, 1988, the Commission denied the petition, stating at length its reasons. Adm. Rec. 1744-1754. The Commission rejected Valero's argument that the Commission's action was invalid because it abrogated Valero's contract right of first refusal without evidence that exercise of that right would violate the antitrust laws:

A. The Commission noted that Valero had numerous opportunities before the May 23, action on Enron's applications to object to the prior approval provision in the consent order but never raised any such objection before. *Id.* at 1746-48.[2]

B. The Commission also noted that in meetings and letters to the staff Valero never argued that disapproval of Valero as a divestee would improperly abrogate Valero's right of first refusal. *Id.* at 1748.

C. Finally, the Commission ruled that "Valero's willingness in September 1987 and in March 1988 to sign agreements that were expressly conditioned on the Com-

[2] The Commission noted that in a letter dated April 11, 1988, to Commission staff, Valero argued that its right to repurchase TransTexas is subject to Commission review of filings made under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a. (Letter is at Adm.Rec. at 1564). The Commission stated that the assertion was incorrect, as the rules issued under that Act exclude from the requirements of the Act assets that are to be acquired pursuant to an order of divestiture. Adm. Rec. 1748-49.

mission's prior approval is inconsistent with its current position that the Commission may not disapprove divestiture to Valero." *Id.* at 1749.

In sum, the Commission declared that Valero's entire course of conduct since 1985 constituted a waiver of any rights Valero may have had to object to the prior approval provision in the consent order. *Id.* at 1750.

33. The Commission also reconsidered but rejected Valero's request that it be approved as a divestee under the requirements of the consent order:

A. The Commission noted that it originally disapproved divestiture to Valero because such sale would not achieve an adequate lessening of concentration among pipeline companies moving gas out of the Permian Basin, and that such sale would increase the already high concentration levels among pipeline companies able to economically supply natural gas to the San Antonio area. *Id.* at 1750. The Commission explained that the new data and arguments submitted by Valero did not demonstrate that the Commission's initial disapproval of Valero on those grounds should be changed. *Id.* at 1752-1753. The Commission stated that Valero did not show that a divestiture to it would achieve as significant lessening of concentration or a decrease likelihood of collusion in the markets alleged in the complaint. Nor, the Commission said, did Valero provide material information addressing the Commission's concerns in the San Antonio area. *Id.*

B. The Commission also considered as dispositive a fact that Valero had initially failed to disclose and which the Commission did not learn until after its May 23 denial—that Valero had elsewhere declared (*e.g.*, in a recent report to its stockholders) that it was Valero's desire and interest to immediately sell Enron's 50% interest in the line after it was acquired. The Commission noted that this intention was inconsistent with the

order, which provides for prior approval by the Commission to ensure that the acquirer of the divested assets will "remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint." The Commission pointed out that a resale by Valero would not be subject to the Commission's prior approval under the order, and therefore there would be no assurance that the divestiture to Valero would achieve the remedial purposes of the order. The Commission noted that, indeed, there would be no assurance that Valero would not resell in a way that would raise concentration levels even further. *Id.* at 1750-1751.

34. On June 24, 1988, defendants Enron and Nortex removed this case to this Court. The temporary injunction entered by the state court remains in effect pursuant to 28 U.S.C. § 1450. On June 27 Enron filed an answer denying any breach of contract and also claiming that any decree requiring it to sell to Valero would conflict with the FTC's order. Subsequently, by leave of Court, Valero amended its complaint, adding the Federal Trade Commission as a party and seeking declaratory relief against the Commission. The compliant [sic] as now amended alleges as a first cause of action a breach or anticipatory breach by Enron of the contract of sale of March 29, 1988 and the right of first refusal. The primary relief sought is a specific performance of those alleged contract obligations. This second cause of action alleges that the Commission's action in denying approval of plaintiff as a divestee under the consent order was arbitrary and capricious and not in accord with the law and constitutes a violation of plaintiff's constitutional rights.

35. No divestiture of Enron's interests in the Trans-Texas Pipeline has occurred due to the June 9, 1988, temporary injunction.

CONCLUSIONS OF LAW

1. This Court has subject matter jurisdiction of this action pursuant to 28 U.S.C. § 1331, § 1337, and the doctrine of pendent jurisdiction, and venue is proper as to all parties.

2. Valero's contractual right of first refusal merely requires Enron, when and if it decides to sell its interest in the TransTexas Pipeline, to offer the interest to Valero on the same terms and conditions as those contained in a third party's good faith offer which Enron is willing to accept. *See Holland v. Flening*, 728, S.W.2d 820, 822-23 (Tex.App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.). Once Enron has notified Valero of its intent to sell under such terms and conditions, the right of first refusal ripens into an option to purchase on the same terms and conditions offered the third party. *Id.*

3. To have properly exercised its ripened option, Valero was required to match all material terms and conditions of Teco's good faith offer. The acceptance of an option, to be effective, must be unconditional and according to the terms and conditions of the option; substantial compliance with those terms is not sufficient. *Hutcherson v. Cronin*, 426 S.W.2d 638, 641 (Tex.Civ.App.—Tyler 1986, writ ref'd n.r.e.). A purported acceptance which arguably leaves the seller "as well off" commercially as the offer by the third party is not sufficient if it varies in any material way from the third party's offer. *See Matson v. Emory*, 676 P.2d 1029, 1032 (Wash. App. 1984); *Coastal Bay Golf Club, Inc. v. Holbein*, 231 So.2d 854, 857-858 (Fla. 1970). This is the case because the terms upon which an optionor such as Enron will sell its property remain its exclusive prerogative so long as it acts in good faith. *Matson v. Emory*, 676 P.2d at 1032; *Weber Meadow-View Corp. v. Wilde*, 575 P.2d 1053, 1055 (Utah 1978); *Coastal Bay Golf Club*, 231 So.2d at 858.

4. The condition of FTC approval was entered into in good faith between Teco and Enron and it was a material

condition of the Teco contract. Any contract by which Valero sought to exercise its right of first refusal must have included that material term. If it did not, a necessary condition to a valid exercise of the right of first refusal had not been satisfied.

5. Valero expressly agreed in Section 1.07 of the Stock Purchase Agreement that its purchase was subject to FTC approval. By its terms (§ 7.10) the Stock Purchase Agreement is the "entire agreement between the parties hereto pertaining to the subject matter hereof." Valero's delivery to Enron of its March 29, 1988 letter after Valero and Enron had executed the Stock Purchase Agreement did not constitute a modification of the agreement. Accordingly, the contract by which Valero exercised its right of first refusal expressly conditions Valero's purchase on FTC approval. This condition has not been satisfied, and as a result, Enron is under no contractual obligation to sell its interest in the pipeline to Valero. The Court holds that Enron did not breach the contract by which Valero could exercise its right of first refusal.

6. The Consent Order entered by the FTC in *In re InterNorth, Inc.*, Docket C-3168, was well within the statutory jurisdiction of the FTC.

7. The FTC is among other things charged with enforcing Section 7 of the Clayton Act, 15 U.S.C. § 18 and Section 5 of the FTC Act, 15 U.S.C. § 45. Section 7 of the Clayton Act (and, derivatively, Section 5 of the FTC Act) provides that mergers and acquisitions are unlawful when their effect may be to substantially lessen competition in any line of commerce in any section of the country. The Commission shares responsibility with the Department of Justice for the enforcement of Section 7.

8. Section 11(b) of the Clayton Act, 15 U.S.C. § 21 (b), directs that whenever the Commission shall have reason to believe that a proposed acquisition violates Section 7 it may initiate an administrative proceeding to pre-

vent or remedy the violation. The Commission initiates an administrative proceeding by issuing a complaint. If the complaint is contested, evidentiary hearings are held. Section 11(b) of the Clayton Act provides that upon finding a violation the Commission may order divestiture of assets or stock to restore competition in the markets adversely affected.

9. A party may choose not to contest a Commission complaint by agreeing to a consent order. Commission Rule 2.31, 16 C.F.R. § 2.31. Before any such consent order may be made final, Commission rules provide that it be published in the Federal Register for the Purpose of "receipt and consideration of comments or views from any interested person." Commission Rule 2.32, 16 C.F.R. § 2.32. After considering any objections or other comments, the Commission has the option of accepting the order or withdrawing its agreement and taking such other action as it deems appropriate in light of comments filed, including initiation of evidentiary hearing, joinder of additional parties, etc. *Id.*

10. If a proposed consent order is finally accepted and issued, it is as effective and enforceable as any litigated Commission order based on a finding that the law has been violated. A party standing in violation of such an order is subject to civil penalties of up to $10,000 a day for each day of noncompliance, as well as a mandatory injunction and other equitable relief. 15 U.S.C. § 41(*l*), 15 U.S.C. § 21(*l*).

11. In remedying violations of the antitrust laws the FTC has broad discretion. *FTC v. Henry Broach & Co.*, 368 U.S. 360, 364 (1962). Divestiture orders typically provide that the FTC must approve the terms and the purchaser of any proposed sale of assets or stock to be divested. *See, e.g., U.S. v. Louisiana-Pacific Corp.*, 569 F.Supp. 1141 (D.Or. 1983).

12. The FTC is authorized to obtain divestiture orders upon the consent of a party as well as following

litigation. FTC consent orders are as valid and enforceable as any order entered after litigation. *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975). A party violating an FTC consent order is subject to civil penalties of up to $10,000.00 per day for each day of noncompliance as well as a mandatory injunction and other equitable relief. 15 U.S.C. § 45(1).

13. As a result of the foregoing, Enron is now required by federal law to sell its interest in the Trans-Texas Pipeline to a purchaser who has the prior approval of the FTC. Enron is subject to civil penalties if it fails to comply. Because the FTC did not approve divestiture to Valero, the specific performance Valero seeks in this action directly conflicts with the requirements of the valid FTC Consent Order.

14. As Docket C-3168 was an action to enforce public rights under section 7 of the Clayton Act, the FTC was fully authorized to prohibit Enron from performing its contractual obligations to Valero even though Valero was not a party to the FTC action. *See National Licorice Co. v. NLRB*, 309 U.S. 350, 362-65 (1939).

15. To the extent the FTC's Consent Order in Docket C-3168 prohibits Enron from performing its contractual obligations to Valero, Valero is not entitled to specific performance that is inconsistent with the FTC's order, because the FTC's order preempts Valero's contractual right to such performance. *See National Licorice Co. v. NLFT*, 309 U.S. 350, 365 (1939); *McLeer v. AT&T Co.*, 416 F. Supp. 435, 439 (D.D.C. 1976); *Delaware v. Bender*, 370 F. Supp. 1193, 1199 (D.Del. 1974); *Natural Resources Defense Counsel, Inc. v. Tenn. Valley Auth.*, 340 S. Supp. 400, [sic] 408 (S.D.N.Y. 1971).

16. The FTC action in disapproving Enron's selling its pipeline interest to Valero does not constitute a taking of Valero's property. First, Valero's rights of first refusal gives Valero nothing more than the right to match a third

party's good faith offer to purchase Enron's pipeline interest. The FTC's action has not impaired that right Valero was free to match, and did match, Teco's good faith offer. The fact that the Teco offer that Valero was required to match contained the condition of FTC approval is a matter of contract and not FTC action. Second, there has been no taking of Valero's property because the FTC's action in Docket C-3168 did not constitute an adjudication of Valero's contract rights. *See National Licorice Co. v. NLRB*, 309 U.S. at 365. *Conner v. Burford*, 836 F.2d 1521, 1541 n. 51 (9th Cir. 1988). Valero remains free to assert against Enron whatever legal rights it may have under the terms and conditions of the Ownership Agreement. *See Id.*

17. The FTC was not required to find the acquisition by Valero of Enron's interest in the TransTexas Pipeline would violate the antitrust laws in order to disapprove Valero's application. Rather, the FTC was entitled to consider which of the competing applications—Teco's or Valero's would better service the remedial purpose of the Consent Order. *See FTC v. Owens-Corning Fiberglas Corp.*, 1987-1 CCH Trade Cas. ¶ 67,463, at 59,941 (N.D. Ohio 1987); *U.S. v. Louisiana-Pacific Corp.*, 569 F. Supp. 1141 (D. Or. 1983).

18. The standard for reviewing the FTC's decision to disapprove Valero as a purchaser is whether the decision was "arbitrary and capricious." 5 U.S.C. § 706(a)(A). The scope of review under this standard is narrow, and the Court is not to substitute its judgment for that of the FTC. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Inc. Co.*, 463 U.S. 29, 42 (1983). This Court must uphold the FTC if there is any rational basis for its decision. *Frederickson Motor Express Corp. v. ICC*, 546 F.2d 104, 106-07 (5th Cir. 1977). Review of the FTC's decision is based on the administrative record already in existence and not some new record made initially in this Court. *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

19. The FTC's action in disapproving the divestiture of Enron's interest in the TransTexas Pipeline to Valero was not arbitrary and capricious. The FTC could rationally conclude that divestiture to Teco, a new entrant, would better further the remedial goal of decreasing concentration among pipeline companies moving gas out of the Permian Basin. In addition, the FTC could rationally conclude that the divestiture of Enron's TransTexas interest to Valero would increase the already high concentration levels among pipeline companies able to economically supply natural gas to the San Antonio area. The TransTexas Pipeline connecting the Permian Basin producing market with the San Antonio consuming market, the FTC could rationally consider both markets in determining divestiture to Teco over Valero. Finally, Valero acknowledged before the FTC that it was seeking to purchase Enron's interest in TransTexas in order to resell that interest to another buyer. The FTC could rationally conclude that this was inconsistent with the Consent Order, which provided for prior approval by the FTC in part to ensure that the divestiture would achieve the remedial goal of lessening concentration among pipeline companies purchasing gas in the Permian Basin. A resale by Valero would be subject to the FTC's prior approval under the Consent Order, and there was no assurance that any such resale would achieve the remedial purposes of that Consent Order.

20. In connection with the action taken by the FTC in disapproving divestiture to Valero pursuant to the 1985 Consent Order, Valero was given reasonable notice and an opportunity to be heard in a meaningful time and manner, and therefore, the FTC's action did not violate the Fifth Amendment to the U.S. Constitution.

21. By the following acts, Valero has explicitly or implicitly agreed to subject its purchase of Enron's interest in the TransTexas Pipeline to FTC approval: (1) its active solicitation of the FTC's action in Docket C-3168; (2) its failure to object to the Consent Order or to ob-

tain an exemption from its prior approval requirement when it had an opportunity to do so; (3) its entering into contracts to purchase Enron's interest expressly subject to FTC approval; (4) its voluntarily submitting to and actively participating in the approval process; and (5) its affirmative efforts to use the approval process as a means of obtaining concessions from Enron.

In accordance with the foregoing Findings of Fact and Conclusions of Law, the Court rules as follows:

Valero's request that Enron be permanently enjoined from selling its interest in the TransTexas Pipeline to any purchaser other than Valero and Valero's request for an order requiring Enron to sell that interest to Valero is DENIED.

Valero's request that the Court declare illegal any order or ruling by the FTC that would prevent Enron's sale of its interest in the TransTexas Pipeline to Valero and Valero's request that the FTC be enjoined from preventing such a sale by Enron is DENIED.

The temporary injunction entered by the state court prior to removal is hereby DISSOLVED.

Holding that Enron did not reach the contract by which Valero could exercise its right of first refusal, it is accordingly ORDERED, ADJUDGED and DECREED that Valero take nothing from Enron or Northern Texas Intrastate Pipeline Company.

All other relief requested is DENIED.

Judgment shall be entered in accordance with the foregoing Findings of Fact and Conclusions of Law.

IT IS SO ORDERED.

Signed this 16th day of December, 1988.

/s/ Emilio M. Garza
EMILIO M. GARZA
United States District Judge

APPENDIX E

FEDERAL TRADE COMMISSION DECISIONS

Complaint

IN THE MATTER OF

INTERNORTH, INC., *et al.*

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-3168. Complaint, Sept. 30, 1985—
Decision, Sept. 30, 1985

This consent order requires InterNorth, Inc. (INI), the Omaha, Neb. acquirer of the Houston Natural Gas Corporation, among other things, to divest within 12 months from the date of the order to a Commission-approved buyer, all the properties listed on Schedule A, and to terminate all rights and obligations it may have on the contracts listed on Schedule B. Should INI fail to complete the required divestiture within the allotted time, a trustee, appointed by the court or the Commission, will be given 18 months from the date of appointment to divest the remaining Schedule A properties. Until those properties are divested, INI is required to use its best efforts to maintain them as ongoing, viable enterprises. The order further prohibits the company, for a period of ten years, from acquiring any assets or interests of a company that is engaging in the gathering or transportation of natural gas in the Permian basin or the Panhandle whose acquisition price is $15 million or more, and from entering into any agreement or venture for the joint purchasing, gathering, or trans-

portation of natural gas in the Permian basin or the Panhandle without prior Commission approval.

Appearances

For the Commission: *Marc G. Schildkraut.*

For the respondents: *D. Stuart Meiklejohn, Sullivan & Cromwell,* New York City, for respondent InterNorth, Inc. and *Richard D. Kinder,* Houston, Tex., in-house counsel, or respondent Houston Natural Gas Corp.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent, InterNorth, Inc., a corporation subject to the jurisdiction of the Federal Trade Commission, intends to acquire, or has acquired the stock or assets of respondent Houston Natural Gas Corporation, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. DEFINITIONS

1. For the purposes of this complaint, the following definitions shall apply:

a. *INI* means InterNorth, Inc., its predecessors, subsidiaries, dividends, groups, affiliate entities, and each of their past or present directors, officers, employees, agents and representatives; and each partnership, joint venture, joint stock company or concession in which INI is a participant. The words *subsidiary, affiliate* and *joint venture* refer to any partial (10 percent or more) as well as total ownership or control.

b. *HNG* means Houston Natural Gas Corporation, its predecessors, subsidiaries, divisions, groups, affiliate entities, and each of their past or present directors, officers, employees, agents, and representatives; and each partnership, joint venture, joint stock company or concession in which HNG is a participant. The words *subsidiary, affiliate* and *joint venture* refer to any partial (10 percent or more) as well as total ownership or control.

c. The acquisition means the transaction described, in whole or in part, in Paragraph 14 of this complaint.

II. RESPONDENTS

A. *INI*

2. Respondent INI is a corporation organized and doing business under the laws of the state of Delaware with its executive offices at 2223 Dodge Street, Omaha, Nebraska.

3. Respondent INI owns businesses that operate at several levels in the natural gas transportation and distribution industry. In addition, respondent INI engages in the exploration for and production of oil and gas, in the production, transportation, and marketing of liquid fuels and in the production and marketing of petrochemicals.

4. Respondent INI had 1984 sales of $7.5 billion and assets of $6.1 billion as of December 31, 1984.

5. In 1984, respondent INI owned and operated the longest natural gas pipeline system in the United States. INI's pipeline division owned and operated a natural gas pipeline system in the United States consisting of over 23,000 miles of pipeline. INI also owned and operated various other natural gas gathering and transmission facilities. Most of INI's system is interstate pipeline.

6. Respondent INI wholly or partially owns (or owns interests in companies that wholly or partially own) the

following natural gas pipelines in the United States: Northern Natural Gas Company Pipeline System; Trans-Texas Pipeline; Overthrust Pipeline; Tiger Ridge Pipeline System; Northern Border Pipeline; Trailblazer Pipeline; Cognac Pipeline; NIPCO Louisiana Pipeline; Central Texas Loop Pipeline; Seagull Shoreline System; Matagorda Offshore Pipeline System; and several pipelines used for the local distribution of natural gas that are operated by Peoples Natural Gas Company, a division of INI.

7. At all times relevant herein, respondent INI has been and is now engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

B. *HNG*

8. Respondent HNG is a corporation organized and doing business under the laws of the state of Texas with its executive offices at 1200 Travis Street, Houston Texas.

9. Respondent HNG engages in the transmission and sale of natural gas, in the exploration for and production of oil and gas, and in hydrocarbons processing and marketing.

10. Respondent HNG had 1984 sales of $2.0 billion and assets of $3.7 billion, as of December 31, 1984.

11. In late 1984, respondent HNG acquired the Florida Gas Transmission Company and the Transwestern Pipe Line Company, for the first time making respondent HNG an interstate pipeline company. Until these acquisitions, respondent HNG had been exclusively an intrastate pipeline system.

12. In 1984, respondent HNG wholly or partially owned the following intrastate pipelines: Llano, Inc.;

Oasis Pipeline Company; Intratex Gas Company; Houston Pipeline Company; Red River Pipeline; HPI Transmission, Inc.; Black Marlin Pipeline Company; Valley Pipelines, Inc.; A-S Pipeline; Texoma Pipeline; and other smaller pipelines.

13. At all times relevant herein, respondent HNG has been and is now engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

III. THE ACQUISITION

14. On or about May 3, 1985, INI commenced a cash tender offer for up to 100 percent of the outstanding shares of HNG common stock at a price of $70 per share with the intent of effecting a merger of InterNorth Holdings, Inc., a Texas corporation wholly-owed by INI, into HNG, pursuant to which HNG would become a wholly-owned subsidiary of INI, all as contemplated in that certain Merger Agreement entered into among INI, its subsidiary, and HNG on May 2, 1985. HNG's Board of Directors has approved the tender offer and recommended its acceptance by HNG shareholders. If all the currently outstanding HNG common shares are tendered to INI, the total value of the transaction is about $2.3 billion and, if consummated, it would result in the largest natural gas transportation company in the United States in terms of assets.

IV. TRADE AND COMMERCE

A. *Purchase and Transportation of Natural Gas*

15. One relevant line of commerce in which to evaluate the effects of the acquisition is the purchase of natural gas in producing fields and basins, and the transportation of natural gas from producing fields and basins to consumers.

16. One relevant section of the country is the Permian Basin, composed of "producing districts 8, 8A and 7C" as defined by the Texas Railroad Commission and "New Mexico-East" as defined by the U.S. Department of Energy.

17. Another relevant section of the country is the Panhandle region, composed of "producing district 10" as defined by the Texas Railroad Commission and the counties of Beaver, Beckham, Cimarron, Ellis, Harmon, Harper, Roger Mills, Texas and Woodward in Oklahoma.

18. Consumption of natural gas in these two sections of the country is substantially below production in the area, with the result that most production in the area is transported by pipelines to consuming areas on the Texas Gulf Coast and elsewhere in the United States.

19. The business of buying and transporting by pipeline natural gas in and out of these respective sections of the country is concentrated.

20. It is difficult to enter into the business of buying and transporting natural gas by pipeline in these respective sections of the country.

21. INI is the sole owner of the Northern Natural Gas Company Pipeline System that runs from the Permian Basin to the Panhandle and from the Panhandle to consuming areas to the north of the Panhandle, including but not limited to the states of Minnesota and Wisconsin.

22. INI is also an owner of an undivided 50 percent interest in the TransTexas Pipeline that runs from the Permian Basin to New Braunfels, Texas, where the Pipeline connects to pipelines that serve areas on the Texas Gulf Coast.

23. HNG is the sole owner of Llano, Inc., that owns a gathering pipeline system in the Permian Basin.

24. HNG is also the sole owner of the Transwestern Pipe Line Company which owns a pipeline system that runs from both the Permian Basin and the Panhandle to

consuming areas to the west of the Permian Basin and the Panhandle, including but not limited to California.

25. HNG is also an owner of 50 percent of the Oasis Pipeline Company which owns a pipeline that runs parallel to the TransTexas Pipeline from the Permian Basin to New Braunfels, and continues to the Texas Gulf Coast consuming area.

26. HNG is also an owner of 25 percent partnership interest in the Red River Pipeline which owns a pipeline that runs from the Panhandle to the Permian Basin, where the Pipeline connects to pipelines that serve areas located outside of the Permian Basin.

27. Respondents INI and HNG are direct and substantial competitors in the business of purchasing and transporting natural gas in and from producing fields and basins to consuming areas.

B. *Transportation and Sale of Natural Gas*

28. One relevant line of commerce in which to evaluate the effects of the acquisition is the transportation and sale of natural gas by pipeline in consuming areas.

29. One relevant section of the country is the Texas Gulf Coast, composed of "producing districts 2, 3 and 4" as defined by the Texas Railroad Commission.

30. The business of selling and transporting by pipeline natural gas in and into the Texas Gulf Coast consuming area is concentrated.

31. It is difficult to enter into the business of selling and transporting natural gas by pipeline in the Texas Gulf Coast consuming area.

32. HNG is the largest competitor in the business of transporting and selling natural gas in the Texas Gulf Coast consuming area.

33. INI is a competitor of HNG through INI's joint venture known as "Nor-Val", a partnership created in

February, 1985, between INI and Valero Transmission Company.

34. INI also competes with HNG by virtue of INI's ownership of 50 percent of the TransTexas Pipeline. TransTexas Pipeline is connected to pipelines serving the Texas Gulf Coast consuming areas at New Braunfels. Some of these pipelines at New Braunfels are owned by Valero Transmission Company. Valero Transmission Company has dedicated capacity to transport natural gas for Nor-Val into the Texas Gulf Coast consuming area.

35. HNG is an owner of 50 percent of the Oasis Pipeline that runs parallel to the TransTexas Pipeline from the Permian Basin to New Braunfels, and continues to the Texas Gulf Coast consuming area.

36. Respondents INI and HNG are direct and substantial competitors in the business of transporting and selling natural gas in the Texas Gulf Coast consuming area.

V. EFFECTS

37. The effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in each of the relevant lines of commerce and relevant sections of the country in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways among others:

a. actual competition between respondents INI and HNG in the relevant lines of commerce and relevant sections of the country will be eliminated;

b. actual competition between competitors generally in the relevant lines of commerce and relevant sections of the country will be lessened; and

c. concentrations in the relevant lines of commerce and relevant sections of the country will be increased, therefore increasing the likelihood of collusion.

VI. VIOLATION CHARGED

38. The proposed acquisition of the stock and assets of HNG by INI, as set forth in Paragraph 14 herein, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The FTC having initiated an investigation of the proposed acquisition of shares of Houston Natural Gas Corporation ("HNG") by Inter-North, Inc. ("INI"), and INI and HNG ("respondents") having been furnished with a copy of a draft complaint that the Bureau of Competition has presented to the Commission for its consideration, and which, if issued by the Commission, would charge respondents with violations of the Clayton Act and Federal Trade Commission; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules and the recommendation of its staff, and having concluded that the consent agreement should be accepted; and

Now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission is-

sues its complaint, makes the following jurisdictional findings and enters the following order:

1. INI is a corporation organized under the laws of Delaware with its executive office at 2223 Dodge Street, Omaha, Nebraska.

HNG is a corporation organized under the laws of Texas with its executive office at 1200 Travis Street, Houston, Texas.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

As used in this order the following definitions shall apply:

(a) *Acquisition* means INI's acquisition of shares of the Common Stock of HNG.

(b) *Schedule A Properties* means the assets and businesses listed in Schedule A of this order. *Schedule B Contracts* mean the contracts listed in Schedule B of this order.

(c) *INI* means InterNorth, Inc., its predecessors, subsidiaries, divisions, groups and affiliates controlled by INI and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

(d) *HNG* means Houston Natural Gas Corporation, as it was constituted prior to the acquisition, including its parents, predecessors, subsidiaries, divisions, groups and affiliates controlled by HNG, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

(e) *Permian Basin* means the counties currently included in Texas Railroad Commission Districts 7C, 8 and 8A and that portion of the state of New Mexico currently defined as *New Mexico—East* by the United States Department of Energy for purposes of reporting on form EIA-23.

(f) *Panhandle* means the counties currently included in Texas Railroad Commission District 10 and the following counties in Oklahoma: Beaver, Beckham, Cimarron, Ellis, Harmon, Harper, Roger Mills, Texas, Woodward.

(g) *Texas Gulf Coast* means the counties currently included in Texas Railroad Districts 2, 3 and 4.

(h) *Texas Gulf Coast Pipeline Company* means a company, other than INI, that delivered, in the twelve months preceding the date of any agreement of the kind described in paragraph IV(D), a daily average of at least 100 million cubic feet/day of natural gas to the Texas Gulf Coast for consumption therein. For the purposes of this definition, the deliveries of any entity acquired by a company during the preceding twelve months shall be deemed to be deliveries of the company for the entire, preceding, twelve-month period.

II.

It is ordered, That:

(A) Within 12 months of the date this order becomes final, INI shall divest, absolutely and in good faith, the Schedule A Properties.

(B) Within 12 months of the date this order becomes final, INI shall terminate all rights and obligations it may have on the contracts listed on Schedule B.

(C) Divestiture of the Schedule A Properties shall be made only to an acquirer or acquirers, and only in a manner that receives the prior approval of the Federal Trade Commission. The purpose of the divestiture of the Schedule A Properties and the dissolution of the Schedule

B Contracts is to ensure the continuation of the assets as ongoing, viable enterprises engaged in the same business in which the Properties are presently employed and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

(D) If INI has not divested the Schedule A Properties within the 12-month period, INI shall consent to the appointment of a trustee in any action that the Federal Trade Commission may bring pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission. In the event the court declines to appoint a trustee, INI shall consent to the appointment of a trustee by the Commission pursuant to this order. The appointment of a trustee shall not preclude the Commission from seeking civil penalties and other relief available to it for any failure by INI to comply with paragraphs II(B) through VI of this order.

(E) If a trustee is appointed by a Court or the Commission pursuant to Paragraph II(D) of this order, INI shall consent to the following terms and conditions regarding the trustee's duties and responsibilities:

1. The Commission shall select the trustee, subject to INI's consent, which shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures.

2. The trustee shall have the power and authority to divest any Schedule A Properties that have not been divested by INI within the time period for divestiture in Paragraph II(A). The trustee shall have 18 months from the date of appointment to accomplish the divestiture, which shall be subject to the prior approval of the Commission and, if the trustee was appointed by a court, subject also to the prior approval of the court. If, however, at the end of the 18-month period the trustee has submitted a plan of divestiture or believes that divesti-

ture can be achieved within a reasonable time, the divestiture period may be extended by the Commission or by the court, if the trustee was appointed by a court.

3. The trustee shall have full and complete access to the personnel, books, records, and facilities of any business that the trustee has the duty to divest, and INI shall develop such financial or other information relevant to the assets to be divested as such trustee may reasonably request. INI shall cooperate with the trustee and shall take no action to interfere with or impede the trustee's accomplishment of the divestiture.

4. The power and authority of the trustee to divest shall be at the most favorable price and terms available consistent with the order's absolute and unconditional obligation to divest and the purposes of the divestiture as stated in Paragraph II(C).

5. The trustee shall serve at the cost and expense of INI on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the court or the Commission of the account of the trustee, including fees for his or her services, all remaining monies shall be paid to INI and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee divesting the trust property.

6. Promptly upon appointment of the trustee and subject to the approval of the Commission, INI shall, subject to the Commission's prior approval and consistent with provisions of this order, execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to cause divestiture.

7. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed.

8. The trustee shall report in writing to INI and the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

(F) INI shall maintain the viability and marketability of the Schedule A Properties and shall not cause or permit the destruction, removal or impairment of any assets or businesses to be divested except in the ordinary course of business and except for ordinary wear and tear. INI shall use its best efforts to ensure that the Schedule A Properties continue to be ongoing, viable enterprises engaged in the same business in which the Schedule A Properties are presently employed.

III.

It is further ordered, That, within sixty (60) days after the date this order becomes final and every sixty days thereafter until INI has fully complied with the provisions of Paragraph II of this order, INI shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying with, or has complied with that provision. INI shall include in compliance reports, among other things that are required from time to time, a full description of contacts or negotiations for divestiture of properties specified in Paragraph II of this order, including the identity of all parties contacted. INI also shall include in its compliance reports copies of all written communications to and from such parties, and all internal memoranda, reports and recommendations concerning divestiture.

IV.

It is further ordered, That for a period commencing on the date this order becomes final and continuing for ten (10) years from and after the date this order becomes final, INI shall cease and desist from (A) acquiring, without the prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries or

otherwise, assets used or previously used in (and still suitable for use in), any interest in or the whole or any substantial part of the stock or share capital of any company that is engaged in the gathering or transportation of natural gas in the Permian Basin or Panhandle (except, however, that, with respect to any particular transaction, INI may, without prior approval of the Commission, (i) acquire any such assets used in the gathering or transportation of natural gas in the Permian Basin or Panhandle so long as the acquisition price of such assets so used is less than $15 million, and (ii) acquire such stock of any such company so long as the fair market value—as computed in the manner contemplated by 16 C.F.R. 801.10—of assets held by such company that are used in the gathering or transportation of natural gas in the Permian Basin or Panhandle is less than $15 million), (B) entering into, without prior approval of the Federal Trade Commission, any agreement or venture for the joint purchasing, joint gathering or joint transportation of natural gas in the Permian Basin or the Panhandle with any other party that owns natural gas transportation facilities in the same area, (C) entering into, without prior approval of the Federal Trade Commission, any agreement, pursuant to the April 10, 1985 agreement in principle between El Paso Natural Gas Company and INI, for the purchasing, gathering or transportation of natural gas in the Permian Basin or the Panhandle, (D) entering into, without prior approval of the Federal Trade Commission, any agreement with a Texas Gulf Coast Pipeline Company for the joint marketing of natural gas sold in and to be consumed in the Texas Gulf Coast in connection with which the joint marketing effort contemplates in excess of three unrelated sales transactions, or (E) tendering to The Dow Chemical Company or to Tenngasco, Inc. or receiving from either of these any new gas purchase contracts under the terms of the Gas Supply Agreement dated February 1, 1972, between Intratex Gas Company, The Dow Chemical Company, and

Tenngasco, Inc. The prohibitions of this Paragraph IV shall not apply to the (i) construction by INI, without any joint venture participants, of new facilities, or (ii) additions by INI, without any joint venture participants, to existing facilities, or (iii) additions to existing joint venture facilities under existing joint venture arrangements.

One year from the date of servce of this order and annually thereafter INI shall file with the Commission a verified written report of its compliance with this paragraph.

V.

For the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to INI and HNG made to its principal office, INI and HNG shall permit any duly authorized representatives of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of INI or HNG relating to any matters contained in this order; and

B. Upon five days notice to INI or HNG and without restraint or interference from them, to interview officers or employees of respondents who may have counsel present, regarding such matters.

VI.

It is further ordered, That INI notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change that may affect compliance obligations arising out of the order.

SCHEDULE A

1. Fifty percent (50%) of HNG's stock in Oasis Pipeline Company, a Delaware Corporation.

2. Fifty percent (50%) of Intratex's dedicated capacity under a certain Gas Transportation Agreement dated February 1, 1972 by and between Oasis and Intratex Gas Company, an HNG subsidiary.

3. The partnership interest held by HNG in Red River Pipeline, a Texas general partnership.

4. Llano, Inc.

5. The fifty percent (50%) undivided interest in the TransTexas Pipeline that was acquired pursuant to the Purchase Agreement, dated as of February 28, 1985 by and among Valero Energy Corporation, Valero Transmission Company, INI, Inc., and Northern Texas Intrastate Pipeline Company.

6. Rights and obligations under the following agreements:

a. Ownership Agreement, dated as of February 28, 1985 between Northern Texas Intrastate Pipeline Company and Valero Transmission Company.

b. Pipeline Operating Agreement, dated as of February 28, 1985 between Northern Texas Intrastate Pipeline Company and Valero Transmission Company.

c. Gas Transportation Agreement No. 5201-972, dated as of February 28, 1985 between Valero Transmission Company and Northern Natural Gas Company.

SCHEDULE B

Rights and obligations under the Nor-Val Gas Company Partnership Agreement, dated February 1, 1985, as amended April 1, 1985.

APPENDIX F

[LOGO]

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

May 23, 1988

Bertram M. Kantor, Esquire
Wachtell, Lipton, Rosen & Katz
299 Park Avenue
New York, New York 10171-0149

Re: InterNorth, Inc.
Docket No. C-3168

Dear Mr. Kantor:

This letter responds to the July 24, 1987, and September 22, 1987, applications of Enron Corp. (formerly known as InterNorth, Inc.) requesting prior Commission approval of the proposed divestiture by Enron of its 50 percent undivided interest in the TransTexas Pipeline ("TransTexas"), including Enron's rights and obligations under the February 28, 1985, Ownership Agreement between Northern Texas Intrastate Pipeline Company ("Nortex") and the Valero Transmission Company ("Valero"); the Pipeline Operating Agreement, dated February 28, 1985, between Nortex and Valero; and the February 28, 1985, Gas Transportation Agreement No. 5201-972 between Nortex and Valero, to Teco Pipeline Company ("Teco") and Valero Natural Gas Partners ("Valero"), respectively. Prior Commission approval of the proposed transactions is required by the order in Docket No. C-3168. Enron's Teco application was supplemented by a letter dated February 2, 1988, and Enron's Valero application was supplemented by a letter dated March 30, 1988.[1]

[1] The applications were placed on the public record for thirty days pursuant to section 2.41(f) of the Commission's Rules of

Based on the information Enron submitted with its requests, as well as other information, the Commission has determined to approve Enron's proposal to divest Enron's 50 percent undivided interest in TransTexas to Teco. The Commission believes, based upon the record in this matter, that divestiture to Teco, a new entrant, will help achieve the remedial goals of the Commission's order in Docket No. C-3168. In according its approval to the proposed Enron/Teco transaction, the Commission has relied upon the information submitted and representations made in connection with Enron's application concerning the Teco transaction and has assumed them to be accurate and complete.

The Commission has also determined not to approve Enron's application concerning Enron's proposal to divest its TransTexas interest to Valero. Divestiture of Enron's TransTexas interest to Valero would not achieve an adequate lessening of concentration among pipeline companies moving gas out of the Permian Basin. In addition, divestiture of Enron's TransTexas interest to Valero would increase the already high concentration levels among pipeline companies able to economically supply natural gas to the San Antonio area. The Commission thus believes, based upon the record in this case, that divestiture of Enron's interest in TransTexas to Valero would not likely satisfy the remedial purposes of the order in Docket No. C-3168.

In light of the Commission's determination not to approve the proposed Enron/Valero transaction, and given Enron's failure to timely divest its 50 percent undivided interest in TransTexas, the Commission reserves the right to take whatever action it deems appropriate, including an action pursuant to the order in this matter and section

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Practice. The supplements have also been placed on the public record but, because they are substantially similar to the applications, another 30-day comment period is not warranted.

5(*l*) of the Federal Trade Commission Act, 15 U.S.C. Section 45(*l*).

By direction of the Commission.

/s/ Emily H. Rock
EMILY H. ROCK
Secretary

APPENDIX G

VALERO ENERGY CORPORATION AFFILIATES AND SUBSIDIARIES

Bay Pipeline, Inc.
Corpus Christi Marine Services Company
J & R Coal Company
Mesquite Services Company
Reata Industrial Gas Company
Rio Grande Valley Gas Company
Rio Pipeline Company
VHC Holding Company
V.H.C. Gas Systems Company
V.H.C. Pipeline Company
VLDC Company
VMC Marketing Company
VMGA Company
VTC Holding Company
Val Gas Company
Valero Building Company
Valero Coal Company
Valero Communications Company
Valero Eastex Pipeline Company
Valero Gas Storage Company
Valero Gathering Company
Valero H/R Land Company
Valero H/R Project Company
Valero Hydrocarbons Company
Valero Industrial Gas Company
Valero Interstate Transmission Company
Valero Javelina Company
Valero Leasing Company
Valero Management Company
Valero Marketing Company
Valero Natural Gas Company
Valero Northern Texas Company

Valero Producing Company
Valero Realty Company
Valero Refining Company
Valero Refining and Marketing Company
Valero Storage Company
Valero Transmission Company

VALERO ENERGY CORPORATION
AFFILIATED LIMITED PARTNERSHIPS

Reata Industrial Gas, L.P.
Rio Pipeline, L.P.
V.H.C. Gas Systems, L.P.
V.H.C. Pipeline, L.P.
VLDC, L.P.
Val Gas, L.P.
Valero Gathering, L.P.
Valero Hydrocarbons, L.P.
Valero Industrial Gas, L.P.
Valero Management Partnership, L.P.
Valero Marketing, L.P.
Valero Natural Gas Partners, L.P.
Valero Texas Pipeline, L.P.
Valero Transmission, L.P.
West Texas Transmission, L.P.

APPENDIX H

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

15 U.S.C. § 18

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise,

may be substantially to lessen competition, or to tend to create a monopoly.

. . .

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

. . .

15 U.S.C. § 21(a)-(c)

(a) *Commissions and Boards authorized to enforce compliance.* Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to subtitle IV of Title 49; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Secretary of Transportation where applicable to air carriers and foreign air carriers subject to the Federal Aviation Act of 1958 [49 U.S.C.A. § 1301 et seq.]; in the Board of Governors of the Federal Reserve System where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

(b) *Issuance of complaints for violations; hearing; intervention; filing of testimony; report; cease and desist orders; reopening and alteration of report or orders.* Whenever the Commission, Board, or Secretary vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14, 18, and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and

containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission, Board, or Secretary requiring such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission, Board, or Secretary. If upon such hearing the Commission, Board, or Secretary, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from any such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 18 and 19 of this title, if any there be, in the manner and within the time fixed by said order. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission, Board, or Secretary may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the commission, board or Secretary may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part,

any report or order made or issued by it under this section, whenever in the opinion of the Commission, Board, or Secretary conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

(c) *Review of orders; jurisdiction; filing of petition and record of proceeding; conclusiveness of findings; additional evidence; modification of findings; finality of judgment and decree.* Any person required by such order of the commission, board, or Secretary to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business, by filing in the court, within sixty days after the date of the service of such order, a written petition praying that the order of the commission, board, or Secretary be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the commission, board or Secretary, and thereupon the commission, board, or Secretary shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the commission, board, or Secretary until the filing of the record, and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the commission, board, or Secretary, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the commission, board, or Secre-

tary as to the facts, if supported by substantial evidence, shall be conclusive. To the extent that the order of the commission, board, or Secretary is affirmed, the court shall issue its own order commanding obedience to the terms of such order of the commission, board, or Secretary. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, board, or Secretary, the court may order such additional evidence to be taken before the commission, board, or Secretary, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission, board, or Secretary may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 and Title 28.

15 U.S.C. § 45(b)

(b) *Proceeding by Commission; modifying and setting aside orders.* Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least

thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this subchapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so

require except that (1) the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section; and (2) in the case of an order, the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partnership, or corporation under paragraph (2) not later than 120 days after the date of the filing of such request.